TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No. 150.

FRANK N. PROUT, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT,

vs.

JAMES C. STARR, SAMUEL W. ALLERTON, AND THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 6, 1903.

(18,244.)

(18,244.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 391.

FRANK N. PROUT, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT,

vs.

JAMES C. STARR, SAMUEL W. ALLERTON, AND THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Exhibit "B"—Tabulated statement	19	12
"C"—Tabulated statement	22	14
Restraining order	23	15
Answer	25	16
Exhibit "A"—Statement showing mileage owned, capital stock, and funded debt of C., R. I. & P. R'y Co. from date of organization to 1892	52	33
"B"—Statement showing rate of dividends on stock of C., R. I. & P. R'y Co. from 1862 to 1892	53	34
"C"—Table showing comparison of rates by classes and cents per hundred pounds in Iowa and Nebraska	54	36

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1901.

	Original.	Print
Replication	56	38
Supplemental bill	57	38
Demurrer of F. N. Prout to supplemental bill	69	45
Order submitting demurrer	72	47
Opinion	73	47
Order overruling demurrer	84	53
Demurrer to supplemental bill	87	54
Demurrer to bill	88	55
Decree	89	56
Petition for appeal	93	58
Allowance of appeal	95	59
Assignment of errors	96	59
Bond on appeal	98	60
Præcipe for transcript	100	61
Citation and acceptance of service	102	62
Certificate of clerk	103	62

1 Pleas before the Honorable William H. Munger, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for the district of Nebraska, within the eighth judicial circuit, at the May, 1901, term thereof.

Be it remembered, that on the 3rd day August, 1893, a "bill" was filed in the clerk's office of said court, which said bill is in words and figures following, to wit:

In equity.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

James C. Starr and Samuel W. Allerton all of the city of Chicago in the State of Illinois and citizens of said State, suing not only on their own behalf but on behalf of all others similarly situated, bring this their bill of complaint against the Chicago, Rock Island & Pacific Railway Company a corporation organized and existing under the laws of the States of Illinois, Iowa and Nebraska, George H. Hastings, attorney general, John C. Allen, secretary of state, Eugene Moore, auditor of public accounts, Joseph F. Bartley, State treasurer and A. R. Humphrey, commissioner of public lands and buildings, all of whom are officers of the State of Nebraska, and as such constitute its board of transportation and William A. Dilworth J. M. Kountz and J. W. Johnson, secretaries of said board, and all citizens of said State.

2 And thereupon your orators complain and say:

I. For twenty years and more last past the Chicago, Rock Island & Pacific Railway Company hereinafter called the Rock Island Company, has been and still is a corporation originally organized and existing under the laws of the State of Illinois and of the State of Iowa, and for three years last past reincorporated as a domestic corporation under the laws of the State of Nebraska. That for twenty years last past, said company has owned and operated a line of railroad extending from Chicago through the State of Illinois and thence to Council Bluffs through the State of Iowa. In 1890 said company acquired running powers over the bridge and road of the Union Pacific Railway Company from Council Bluffs to South Omaha in this State and constructed a line of railroad from South Omaha to Lincoln from which point to Beatrice it acquired running powers over the road of the Omaha & Republican Valley Railroad Company. In that year the said Rock Island Company acquired a line of railroad from Rock Island to St. Joseph and thence to the southeast corner of Pawnee county in this State, and thence by way of Beatrice to Fairbury and also a line from Fairbury on the road last above mentioned to the southwest corner of Fillmore county and thence through Kansas to Colorado to Denver. Its road in this State extending from the southeast corner of Pawnee county to Nelson and from Fairbury to the southwest corner

of Fillmore county being in this State, and the said two lines together being about 130 miles in length. And in that year the said company established a through line from Chicago to Denver over the roads above described by way of Omaha, Beatrice and Fairbury. The said company also own and operate several other lines in the States of Illinois, Iowa, Wisconsin, Minnesota, Missouri, Kansas, Colorado and Indian Territory. All of its roads in
3 this State were constructed since the first of January 1889, save the line from the southeast corner of Pawnee county to Nelson and from Fairbury to the southwest corner of Fillmore county.

II. Your orators are and for six months and more have been owners and stockholders of said company holding 604 shares of the capital stock thereof, each of which is of the par value of $100.00. The whole of the said company's stock is distributed among and held by more than 10,000 parties and it is impracticable to implead them all in a complaint to your honors. And your orators are compelled to and do exhibit this their bill in behalf not only of themselves but on behalf of all others, stockholders of said company.

III. The individual defendants in this bill of your orators are and for six months have been officers of the State of Nebraska, that is to say; the said Hastings is attorney general the said Allen is secretary of state, the said Moore is auditor of public accounts, the said Bartley is treasurer, the said Humphrey is commissioner of public lands and buildings and as such officers they constitute a board of transportation. William A. Dilworth, J. M. Kountz and J. W. Johnson are secretaries of said board. The said defendants pretend and allege that at its last session the legislature passed and in the 12th of April last past the governor approved an act entitled "An act to regulate railroads, to classify freight to fix reasonable maximum rates, to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act."

IV. And the said board and the members thereof have threatened that they will and unless restrained by the order and injunc-
4 tion of this court, they will put in action the full powers of said board under the act above entitled, and the law of said State by which the said board is created of inquiry, examination and determination against the said Rock Island Company and will require it to make, keep, publish and post so as to be conveniently inspected in every one of its depots and stations on its road above described from the southeast corner of Pawnee county to Nelson and from Fairbury to the southwest corner of Fillmore county, schedules showing the rates and charges for transportation of passengers and property on said road and the places thereon upon which the same will be carried and the classification of freight, together with the terminal charges, and rules and regulations which in anywise change, affect or determine any part of the aggregate of such rates and charges and will entertain, hear and determine whatever complaints may be made to said board by any and all persons and parties alleging the violation by said Rock Island Com-

pany of any and every the commands, injunctions and prohibitions in the said two several laws above referred to contained, or neglect on their part to obey and observe the same. And upon such complaints will order and require said company to comply with the provisions of the act above entitled which for convenience is hereafter called house roll 33. Particularly by classifying freight to be carried on such road, and reducing the rates of charge for the transportation thereof as in said act provided and make, publish and post schedules of such rates and charges conformable to said act and will upon each and every such order and requirement of said board, apply to one of the courts of said State for an order of injunction or other process mandatory or otherwise to restrain said company from violating or disobeying such its order or requirement and enjoining obedience of the same and for writs of attachment and other process out of said court against said company, its
5 directors, officers and agents to the end that they be fined as in said act provided. And will order the attorney general and the county attorney of the counties through which said road or any of them may run to institute suits to compel said company to comply with said order and will also apply to the supreme court and the district court of said State in the name of said State on relation of said board for writs of mandamus to compel said company to obey the said orders, and will also require the attorney general and the said county attorneys to prosecute said company for each and every act done or omitted, commanded or forbidden by said act and seek to impose upon said company the severe penalties described by said act against its property, which actions, proceedings and indictments will be very numerous, and if they be effectively prosecuted, will sweep away all the company's property. That the attorney general has given notice to said company that it is his purpose and the purpose of said board to enforce all the provisions of said house roll 33 promptly, vigorously and to the full extent of the powers conferred upon him and said board in that behalf by each and every of the proceedings mentioned and described by the two laws above referred to, against any and every railroad company in this State which shall in anywise do or omit what in the said laws or either of them is commanded or forbidden, and personally to take charge of such proceedings and prosecute them to the full extent of the law, and so he will do unless restrained by the order and injunction of your honors as hereinafter prayed.

V. Since the said company acquired the said road from the southeast corner of Pawnee county, to the southwest corner of Fillmore county and to Nelson, the said roads have not earned upon the business done thereon, operating expenses and fixed charges arising from the operation thereof. The administration of said company and of said roads has always been characterized by exceptional skill and judgment and returns from its business were all that the same
6 could be made to render; yet the same have returned to your orator and its other stockholders nothing upon their capital. Nevertheless the rates of charges for the transportation of freight on said road to this State attempted to be fixed by house roll

33 are one-fifth less than those heretofore charged by said company. And if said act and the rates therein prescribed shall go into operation, the earnings of said company on said roads from its business thereon, and especially from its freight business will be more than one-fifth less than it has heretofore realized and will not pay the operating expenses thereof, nor yield any moneys from which the said property may be maintained and will operate a confiscation of the said property in violation of the provisions of the Constitution of the United States and of this State against taking property for public use without compensation and without due process of law.

VI. By the said house roll 33 rates of charge are prescribed for transporting divers articles which are less than the average cost to which said company will be subject in rendering such service some of which are the following: all those included in classes D and E of the classification prescribed by said act above entitled, also wheat, flour, mellet and flax-seed, grains and mill-stuffs, lumber all kinds of coal, that is to say, hard and soft, lump and nut, pea and slack; when any of the aforesaid classes and articles are to be carried for considerable distances; also all articles which are to be carried in small packages for short distances. Your orators for the purpose of illustration point out that upon packages of merchandise of the weight of twenty-five pounds carried five miles, the rates of charges allowed under said house roll 33 are as follows: for first-class, three and one-quarter cents, second-class two and three-quarters cents; third-class two and one-fourth cents; fourth-class, one and three quarters
7 cents; if carried twenty-five miles, the rates are for first class, four and one-fourth cents, second class three and three-fourths cents, third class two and ninety-five-hundredths cents; fourth class two and forty-five-hundredths cents, which rates do not yield to the company of your orators, the cost of receiving and forwarding any of the packages aforesaid. And your orators aver that this is true of all rates fixed by said house roll 33 upon all small packages carried short distances; and your orators submit that upon the face of the schedules and classification, there are divers inconsistencies, inequalities and injustices in that the rate of charges prescribed by said act for transportation of divers articles are less for a certain distance than those prescribed for a shorter distance and for example your orators point out that the rate prescribed in house roll 33 upon lumber, laths, shingles, doors, sash and blinds, for eighty-five miles is 8 cents per hundred pounds while for 90, 95, 100 and 105 miles, the rate prescribed is but 6 cents; for 110 and 115 miles, the rate is but six and one-quarter cents per hundred pounds; for 120 miles, the rate is but 7 cents per hundred pounds, for 125 miles the rate is but seven and one-half cents for 130 miles, the rate is but 8 cents per hundred *miles*; and your orators submit that this is an arbitrary and obvious oppression, inequality and injustice.

Your orators submit that while the company having regard to circumstances, may carry an article for less than cost to it of such services and a fair profit, yet the legislature cannot compel it to do so that being the taking of the company's property for public use without returning compensation therefor and without due process

of law and it being practically impossible to assure to your company a profit on some other service which will answer the deficiency.

8 VII. The unreasonableness of the rates fixed by house roll 33 appears from a comparison of them with those allowed by law to companies similarly situated in other States; hereto annexed is a table showing this comparison marked Exhibit "B" and made a part hereof.

VIII. In July and August 1891 the board of transportation prosecuted a th-rough and exhaustive inquiry into the reasonableness of the rates of charge for transportation of freight within this State by the company of your orators and after hearing many parties upon one side and the other and evidence adduced by them respectively and upon the report of the secretaries of said board, it rendered an elaborate opinion covering the whole matter in all its aspects which concluded as follows:

"*Findings of the Board.*

After a careful and quite thorough investigation of the question of freight rates in Nebraska, which has occupied much time, and has taken a wide range, the State board of transportation has arrived at the conclusion that the rates now in force in this State cannot be generally reduced without doing violence to the business interests off the State, and at the same time injuring the shipping and producing classes.

We have come to this conclusion, not by taking the cost of construction and equipments nor the amount of stock and bonds issued per mile, but by making our computations upon the basis of what it would cost to duplicate the property at the present time.

It has been our endeavor to deal fairly and justly with the question, and in arriving at a conclusion we have been governed only by the evidence, statements and facts produced for our consideration.

A candid examination and comparison of the figures presented to us in the unanimous report of the board of secretaries in
9 the opinion of this board fully justifies the conclusion reached that a general reduction of the rates as now in force in this State is not practicable at this rime."

Since the date of the said report, the said board has not had the matters therein mentioned before it for inquiry, examination or determination, nor has it in anywise modified the findings and conclusions reached by it in the aforesaid investigation, nor in anywise modified the same, nor have the circumstances existing at the time of their aforesaid investigation been in anywise modified save that by reason of the depressed condition of the country and particularly of business upon the railroads in this State, the conditions are less favorable than they were at that time.

VIII. When the said Rock Island Railroad Company acquired its lines above described running from St. Joseph in the State of Missouri to the southeast corner of Pawnee county and thence to Nel-

son and from Fairbury to the southwest corner of Fillmore county thence to Denver, and acquired running powers over the road of the Union Pacific Railway Company from Council Bluffs to South Omaha and from Lincoln to Beatrice and constructed its road from South Omaha to Beatrice, when and as above stated, and during all the period of the said transactions the constitution of the State of Nebraska has contained the following provisions: "The legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State" whereby it was declared by the fundamental law that the legislature should not nor would at any time pass a law establishing maximum rates of charges for the transportation of freight on the different railroads in this State which were or should be unreasonable. And the said company relied upon the said limitation of the powers in that behalf of the legislature when it acquired the said railroads in this State and but for the same it would not have expended what was necessary to and what it
10 did expend in order to acquire the said roads; and thereby a contract was entered into by and between the State and said company, the said State on its part agreeing that its legislature should never pass a law establishing maximum rates of charge for the transportation of freight on said roads in this State which were or should be unreasonable; in consideration that the said company acquire said railroads and operate the same according to law, the said company on its part agreeing to so acquire and operate the said roads upon the consideration among others that no such law should be enacted until the passage of the said house roll 33, the said parties and each of them have respectively kept and performed the said contract between them, and the said company of your orators has continued to do so unto this day. The legislature of said State by the said alleged act has sought to establish rates of charges for the transportation of freight on said company's road in this State, which, as hereinbefore shown, are grossly unreasonable, and said act is a law which impairs the obligation of the said contract, and is repugnant to the Constitution of the United States, and is, therefore, null and void.

IX. The said house roll 33 not only fixes and establishes rates of charge for the transportation of freight which in the first instance as the same are fixed by said act are absolute and arbitrary, the same having been made by the legislature in and by the said act without hearing the said company in and about the said matter or consideration of the facts and circumstances proper and necessary to be considered in determining what are just and reasonable rates of charge for the transportation of freight upon the roads of said company, but the said act with severe assiduity excludes every mode of inquiry into their reasonableness. The classification of freight is expressly made permanent save as it may be revised by the board of transportation at its pleasure without hearing or opportunity for complaint by said company. The rate apportioned upon said
11 classification while they may be the subject of imperfect and preliminary inquiry in the supreme court are not as to their

reasonableness matter of determination or judgment in or by said court and it is only empowered to refer the same to said board for its discretionary action which action is without hearing the said company and without having before the said board evidence pertinent to the matter and with power limited to raising the rates not above those charged on the 1st of January last past. And the several provisions, clauses and terms of said bill are skillfully framed so as to forbid a reduction of rates except as hereinbefore set forth. And while said company is subjected to actions by parties who allege themselves to be injured by the non-observance by said company of the provisions of said act and to indictment and heavy and unreasonable penalties on that account all defenses on the ground that the rates charged by said company are just and reasonable though not conformable to those prescribed by said act are by its terms wholly excluded and denied to said company.

But for said act in an orderly litigation either in an action for damages or an indictment against said company for not obeying the provisions of said act, if opportunity were offered, said company could submit in its defence evidence tending to show that the rates charged by it in excess of those fixed in said act were just and reasonable and thereby defend itself against complaint for violation of said act, in said State to every person and party save and except the said company and other common carriers of like character justice is dispensed in the courts of law freely and without denial or delay in pursuance of the fundamental principles of American Government and of the Constitution of the United States and the constitution of the State of Nebraska and especially in an action or indictment such as are in the said house roll 33 provided he will be heard to allege in his defense such matters as in
12 the said act are denied to said company and other like parties.

Wherefore your orators submit that the said alleged act denies to said company the equal protection of the laws, and deprives it and your orators and all others similarly situated of their property without due process of law and is repugnant to the Constitution of the United States and the constitution of this State and is therefore null and void.

X. The several roads of the said Rock Island Company first above described as well as those running from one State into another as those which begin and end in this State, are operated together as one connected continuous line without discrimination of one against another, upon regulations, tariffs and schedules common to them all, by through trains and cars without change, interruption or delay so that every carriage wherever beginning and ending on any of said roads is one carriage from place of shipment to place of destination and business on all of said roads when the same originates in one State and is destined to another, and business beginning and ending in this State are carried on together in the same cars and trains and under the same regulations in all respects without difference or discrimination or regard to boundaries of States. If said house roll 33 and the rates of charge therein prescribed are put in force the

reduction of rates on business beginning and ending within this State will be so great as necessarily to reduce the rates which said company can charge upon its lines running from the southeast corner of Pawnee county to the southwest corner of Fillmore county and to Nelson, upon businesss originating in other States and destined to points on said roads and also on business originating on said roads and destined to points in other States.

The intimate and necessary relations of interstate and local traffic and of the rates of charges thereon are such as to require that the said company in its character as an interstate carrier be
13 withdrawn and exempted from the jurisdiction of the State of Nebraska, and be regulated only by the Constitution and laws of the United States.

And your orators submit that forasmuch as the Constitution of the United States and the laws thereof *has* committed to Congress the power to regulate commerce among the States and withdrawn the same from every degree of interference on the part of any State, the said house roll is interferring therewith, is repugnant to said Constitution and is null and void.

XI. Said house roll 33 was on the 14th of January 1893 introduced into the house of representatives of the legislature and was the subject of consideration, amendment and action upon several days, and on the 11th of March was declared passed. But the same was not read at large in that house on three different days but was put upon its passage without being so read. In engrossing said bill in said house, divers radical charges were made therein, without the action or knowledge of said house, and said engrossed copy of said bill was transmitted to the senate in which body the same was the subject of consideration, amendment and action, but was not read at large on three different days and was put upon its passage without being so read, the protest oral and written then and there made by several senators to the contrary notwithstanding. Being returned to said house it was there enrolled but the said enrolled bill in many particulars differed from that passed by the two houses in which form it was signed by the governor so that it happened that the said bill passed by the two houses was never signed by him and that signed by him, never passed the two houses.

XII. The alleged act first above entitled, was in its frame, terms, provisions and purpose amendatory of the act by which the said board was created. Yet the said house roll 33 did not contain the section of the former act to amended, nor repeal those so
14 amended in disregard of the provisions of the constitution of this State, and by reason thereof the same is void.

XIII. The said house roll 33 denies to said company the right to be heard in the courts of this State upon the question of the reasonableness of the rates of charge therein prescribed, and in its defense in an action against it for damages alleged by a party on account of greater charge by it and also in an indictment against it therefor, to allege and show that the rates prescribed by said act are unreasonable and that the rates charged by it are reasonable and at the same time imposes upon the supreme court, the purely

administrative function of a preliminary inquiry whether the board of transportation may at its option increase the rates therein prescribed, and on the other hand commits to said board the reasonableness of the rates fixed by said act. All which confusion of the powers and functions of the executive departments of the Government is repugnant to the Constitution and the provisions thereof, that no person or collection of persons being of one of these departments shall exercise any power properly belonging to either of the others, and is for that reason null and void.

XIV. On the 31st of July last passed, your orators learned for the first time what was the nature and effect of the said house roll 33, and thereupon they requested the president of said company, to whom the administration of its affairs is largely committed and particularly the fixing and changing of rates to be charged for the transportation of freight on its roads, to disregard said act and maintain the rates then and theretofore charged by said company without reducing the same to those prescribed by said act, and also to convene a meeting of the board of directors, or if it should be impracticable so to do, to convene a meeting of the executive committee of said board to take into consideration the said act and the objections thereto hereinbefore set forth to the end that the rates theretofore charged by said company should be maintained notwithstanding said act. The president of said company declined to entertain the said application and request of your orator-, and repeated the order theretofore made, that the rates of charge upon the said company's roads from the southeast corner of Pawnee county to the southwest corner of Fillmore county and to Nelson, should be reduced as required by said house roll 33. This bill is not exhibited before your honors by col-usion with said company or its officers or directors for the purposes of giving jurisdiction to this court of the matters and things set forth and alleged in this bill of your orators. It has not been practicable for your orators to solicit and secure the co-operation of other stockholders of the company either in their aforesaid applications to the said president thereof, or in exhibiting this their bill in consequence of the necessity of immediate action. And your orators pray that others stockholders of the company may be admitted parties hereto if they so desire, they paying and undertaking to pay their share of the expenses of this suit.

Your orator- well hoped that the said defendants would not interfere with said company, its business or property, under the pretense that the said house roll 33 was binding upon any of them, but they refuse so to do.

All which actings, doings, refus*las* and pretenses are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators and all others stockholders of said company in the premises.

But now so it is may it please your honors, the said defendants conspiring and confederating together and with divers others to your orators unknown, whose names when discovered they pray may be inserted herein as defendants, refuse so to do.

To the end therefore that the said defendants may if they
16 can show why your orators should not have the relief herein prayed and that they answer this bill of your orators according to the course and practice of the court but not under oath, the answer of each of them under oath being hereby expressly waived, and that the said Rock Island Company its officers, agents, servants and employees be by the order and injunction of your honors, enjoined from making or publishing or posting a schedule of rates to be charged by it for the transportation of freight on or over its roads in Pawnee and Fillmore counties, according to the terms and provisions and commands of said house roll 33 and from reducing its charges for such service from the rates now charged by it to those prescribed by said act, and from obeying, observing or conforming to the commands, provisions, injunctions and prohibitions of said act or any thereof, and that the said board of transportation and the members thereof, and the secretaries thereof be enjoined from entertaining, hearing or determining any complaint against said company for or on account of any act or thing by it or its officers, agents, servants or employés done, suffered or committed, which may be commanded or forbidden by said act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal against said company, for any act or thing by it or its officers, agents, servants or employees done or omitted which may be forbidden or commanded by said act ,and particularly from not reducing its present rates of charges for transportation of freight to those prescribed by said act. And that the attorney general be in like manner enjoined from bringing or aiding in bringing or causing or advising to be brought any proceeding by way of injunction or mandatory or other process or civil action or indictment against said company for or on account of the non-observance by it of the provision of said act, and if any county attorney or other person shall bring
or threaten to bring any action or proceedings, then and in
17 that case his name be inserted in this bill as a defendant and he be in like manner enjoined from instituting, prosecuting or advising any such actions or proceedings and that the injunction hereinbefore prayed, be operative against him as if he were now here named and impleaded herein as a party hereto. And that it be by the decree of your honors declared that said house roll 33 is repugnant to the provisions of the Constitution of the United States and the constitution of this State and that the proceedings of the legislature of this State in the pretended passage of this act were ineffectual to pass the same as a law, and that it be decreed that the injunction hereinbefore prayed, be perpetual and that your orators have the costs of this their bill and all such other and further relief as the circumstances require and is agreeable to equity and good conscience.

May it please your honors to grant unto your orators, not only the writ of injunction hereinbefore prayed, issuing out of and under the seal of this court directed to the Chicago, Rock Island and Pacific Railway Company, its officers, agents, servants and employees, George H. Hastings, attorney general, John C. Allen, secretary of

state, Eugene Moore, auditor of public accounts, Joseph F. Bartley, State treasurer, and A. R. Humphrey commissioner of public lands and buildings, constituting the board of transportation, and William A. Dilworth, J. M. Kountz and J. W. Johnson, secretaries of said board, commanding and enjoining them, and their deputies, clerks and servants as hereinbefore prayed, but also a writ of subpœna issuing in like manner and directed to the said defendants, commanding them that at a day therein to be inserted, they appear before your honors in this honorable court, then and there to answer the premises and stand to, perform and abide such order and decree as to your honors shall seem meet and equitable.

18 And your orator- will ever pray, etc.

J. M. WOOLWORTH,
Sol. for Pl'ffs & of Counsel.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth being duly sworn says that he is the solicitor for the plaintiff- in the foregoing bill, that they are non-residents of and absent from the said State, that he has read the said bill and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. M. WOOLWORTH.

Subscribed and sworn to before me this 2nd day of August, 1893.

[SEAL.] FANNIE M. PRATT,
Notary Public.

EXHIBIT B.

Distance in miles.	Name of distance tariff.	Classes. 1	2	3	4	5	A	B	C	D	E	Wheat, flour and flaxseed.	Other grain and mill stuffs.	Lumber.	Salt, lime, and cement.	Horses and mules.	Cattle and calves.	Hogs.	Sheep.	Coal, hard, per ton.	Coal, soft (lump), per ton.	Coal, soft (pea), per ton.	Name of distance tariff.	Distance in miles.
5	Wisconsin	9	8	7	6	4	4	3⅝	3	3	3	3⅝	3⅝	3	3	3⅝	3	3⅝	3⅝	....	35	35	Wisconsin	5
	Minnesota	12	10	8	6	5	5	4	4	3	2	3⅝0 4	3⅝	3	....	3⅝	3	3	3	....	...	...	Minnesota	
	Dakota	12	10	8	6	5	5	4	3⅝	3	2½	5-5	5	4	3	5⅝	5	6	6	....	...	...	Dakota	
	Kansas	13	11	9	7	6	6	5	4	4	3	5	4	4⅛	4½	10⁰⁰	9⁰⁰	9⁰⁰	6⁰⁰	....	60	60	Kansas	
	Newberry rates	13	11	9	7	5	5	4	3	3	2	4	4	4	3	10⅞	9⅞	8⅝	8⁰	60	30	25	Newberry rates	
50	Wisconsin	30	25	20	15	11⅝	11⅝	9	7½	6⅝	6	10	10	7½	7	11⁰⁰	10	12½	12½	....	....	....	Wisconsin	50
	Minnesota	30	25	20	15	12	12	11	9	8	6	10-10	10	8	....	11	10	10	10	....	...	...	Minnesota	
	Dakota	32	27	21	16	13	13	11	10	8	6	9-10⅝	9	8⅝	10	12⅝	11⅝	13	13⅝	....	...	...	Dakota	
	Kansas	32	29	25	21	15	15	11	9	7	5⅝	8	6⅝	8	11	22⁰⁰	18⁰⁰	18⁰⁰	15⁰⁰	....	115	115	Kansas	
	Newberry rates	24	19	14⅝	12	10	10	8	7	6	3⅝	7	7	7	5⅝	17⅝	16⅝	13	12	96	66	52	Newberry rates	
100	Wisconsin	40	33	27	20	16	16	14	12	10	8⅝	12⅝	12⅝	12	10⅝	16⅝	15	18⅝	18⅝	....	....	....	Wisconsin	100
	Minnesota	40	33	27	20	16	16	14	12	10	8	12⅝-15	12⅝	13	...	16⅝	15	15	15	....	...	...	Minnesota	
	Dakota	42	36	27	21	17	17	15	13	11	8	13-15⅝	13	13⅝	15	18¼	16⅝	18⅝	19⅝	....	....	....	Dakota	
	Kansas	52	44	38	31	27	24	16	14	10	7⅝	10¼	8¼	13	15½	33⁰⁰	27⁰⁰	27⁰⁰	20⁰⁰	....	150	150	Kansas	
	Newberry rates	29	25	21	20	16	16	11	9	7	6	10⅝	9	6	9	25	21⅝	18	16	136	100	74	Newberry rates	
20																								
150	Wisconsin	50	42	33	25	20	20	17⅝	15	12⅝	10⅛	15	15	14⅝	13	19⅝	17⅝	21⅞	21⅞	....	....	....	Wisconsin	150
	Minnesota	50	42	33	25	20	20	18	15	13	10	15-18	15	15⅝	....	19⅝	17⅝	17⅝	17⅝	....	....	....	Minnesota	
	Dakota	57	48	37	29	23	23	20	17	14	11	16-18⅝	16	16	18	20⅝	19	21⅝	22⅝	....	....	....	Dakota	
	Kansas	63	55	49	40	35	29	21	19	13	10⅝	14	12	16	20¼	41⁰⁰	36⁰⁰	36⁰⁰	25⁰⁰	....	2⅛	2⅛	Kansas	
	Newberry rates	41	36	32	24	22	23	14	13	9	6⅛	13	11	9	12	30	25⅝	21	19	170	115	89	Newberry rates	

200	Wisconsin	60	50	40	30	24	24	20	17	15	12[a]	17[b]	17[b]	17	15[b]	22	20	25	25	....	....	....	Wisconsin	200
	Minnesota	60	50	40	30	24	24	21	18	15	12	17[a]-20[b]	17[b]	18	....	22	20	20	20	....	....	....	Minnesota	
	Dakota	72	61	47	36	29	29	25	22	18	14	18[a]-21	18[b]	18[a]	22	23[aa]	21[b]	24[a]	25[b]	..	..	....	Dakota	
	Kansas	73	65	58	46	41	34	26	22	16	12	15¼	13¼	19	23	47[aa]	41[aa]	41[aa]	30[aa]	..	245	245	Kansas	
	Newberry rates	55	48	43	36	31	29	20	17	12	8	14	13	11	13	35	29[a]	24	22	200	130	104	Newberry rates	
250	Wisconsin	68	57	45	34	27	27	22[b]	19[a]	16[a]	14	18[b]	18[b]	18[b]	16[a]	24[1b]	22[b]	28	28	....	....	....	Wisconsin	250
	Minnesota	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	Minnesota	
	Dakota	82	70	53	41	33	33	29	25	21	16	21-23[a]	21	21	25	26[a]	24	27[b]	28[b]	....	....	....	Dakota	
	Kansas	78	70	63	51	46	39	31	25	18	13[b]	16	14	21	24¾	49[aa]	43[aa]	43[aa]	31[aa]	..	280	280	Kansas	
	Newberry rates	58[a]	53	47	41	35	30[b]	22[b]	18[a]	13[a]	10	14[a]	13[b]	14[a]	15[b]	38[1b]	34	28	23[a]	220	140	114	Newberry rates	
21																									
300	Wisconsin	75	63	50	38	30	30	25	22	19	15	20	30	20	18[1]	27[a]	25	31[a]	31[b]	....	....	....	Wisconsin	300
	Minnesota	75	63	50	38	30	30	26	23	19	15	20-23	20	23	....	27[a]	25	25	25	....	....	....	Minnesota	
	Dakota	92	78	60	46	37	37	32	28	23	18	23-25[a]	23	23[a]	27	29[1a]	26[a]	30	31	....	....	....	Dakota	
	Kansas	83	75	68	56	51	44	34	27	21	16	16¼	14¼	22	27	51[aa]	46[aa]	46[aa]	32[aa]	..	325	325	Kansas	
	Newberry rates	62	57	52	46	39	32	26	20	15	12	16	14	17	18	42[a]	38[a]	32	25[b]	240	150	124	Newberry rates	
350	Wisconsin	83	69	55	41[a]	33	33	27[b]	24[a]	20[a]	16[a]	21[a]	21[a]	21[a]	20[a]	30[2a]	27[a]	34[a]	34[a]	....	..	....	Wisconsin	350
	Minnesota	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	Minnesota	
	Dakota	102	87	66	51	41	41	36	31	26	20	24-26[a]	24	25[a]	30	31[a]	29	32[a]	33[b]	....	....	....	Dakota	
	Kansas	88	80	73	61	56	49	36[b]	30	23	19	17¾	15¾	23	32	60[aa]	48[aa]	48[aa]	34[aa]	..	380	380	Kansas	
	Newberry rates	69	62	57[a]	51	40	35	29	23	17[a]	13[a]	17	15	19[a]	20[a]	46	41	34[a]	28[a]	260	160	129	Newberry rates	
400	Wisconsin	90	75	59	45	36	36	30	26	22[a]	17[a]	22[a]	22[a]	24	22[a]	33	30	37[a]	37[a]	....	....	....	Wisconsin	400
	Minnesota	90	75	60	45	36	36	32	27	23	18	22[a]-25[b]	22[a]	28	....	33	30	30	30	....	....	....	Minnesota	
	Dakota	110	94	72	55	44	44	39	33	28	22	25-28	25	26[a]	33	34[aa]	31[a]	35	36	....	....	....	Dakota	
	Kansas	110	102	85	76	70	59	46	36	31	22	19	17	30	37	66[aa]	51[aa]	51[aa]	37[aa]	....	410	410	Kansas	
	Newberry rates	74	66	62	56	42	40	34	27	20	16	18	16	22	23	49[a]	43[a]	37[a]	30[31]	280	170	134	Newberry rates	

Using the present rates, Chicago to Lincoln and Chicago to Omaha, and house roll 33, rates beyond Omaha and Lincoln, the through rates will be as follows:

Chicago to—	By way of—	Classes.									
		1	2	3	4	5	A	B	C	D	E
Harvard	Lincoln	1.08	.89	.65	.52	.39	.47	.38	.32	.27½	.24
	Omaha	1.12	.94	.72	.53	.45	.50	.38	.32	.25½	.22
Hastings	Lincoln	1.09	.90	.67	.54	.44	.49	.39	.32	.27½	.25
	Omaha	1.17	.98	.76	.56	.48	.53	.39½	.33½	.27	.22½
Holdrege	Lincoln	1.22	1.03	.80	.60	.51	.56	.42½	.36½	.30	.25½
	Omaha	1.30½	1.09	.86	.67	.56½	.59	.45½	.37	.20½	.24½
Superior	Lincoln	1.12	.94	.72	.56	.46	.51	.40	.34	.28½	.25
	Omaha	1.23	1.03	.81	.62½	.52	.57	.40½	.34½	.28	.23
McCook	Lincoln	1.37	1.16	.91½	.73	.61	.62½	.49½	.40½	.32½	.28½
	Omaha	1.37	1.16½	.93½	.75	.63½	.62	.50½	.40	.32	.27½
The present rates.											
Chicago to	Lincoln	.80	.65	.46	.34	.28	.33	.28	.23	.20½	.19
	Omaha	.75	.60	.42	.30	.25	.30	.25	.20	.17½	.16

23 Thereupon afterwards, to wit: at the May 1893 term of said court, and on the 3rd day of August, 1893, the following proceedings were had and done in said case, as appear of record on Journal "R" page 737 of said court, to wit:

SAMUEL W. ALLERTON ET AL.
v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company *et al.* } No. 64, Docket "Q."

Upon reading and filing the bill of complaint, and it appearing that the exigency requires the making of this order, it is ordered as follows:

1. The defendants The Chicago, Rock Island & Pacific Railway Company, its directors, officers, agents and counselors are hereby enjoined and restrained from making, publishing or posting a schedule of rates to be charged by them for the transportation of freight on or over their road in this State running from the southeast corner of Pawnee county to the southwest corner of Fillmore county, and to Nelson according to the terms, provisions and commands of the act in the said bill called house roll 33. And from reducing their charges for such services from the rates charged by them on the 31st of July instant to those prescribed by said act, and from obeying observing or conforming to the commands, provisions, injunctions and prohibitions of said act or any thereof.

2. That the said defendants George H. Hastings, attorney general, John C. Allen, secretary of state, Eugene Moore, auditor of public accounts, Joseph F. Bartley State treasurer and A. R. Humphrey, commissioner of public lands and buildings, constituting the
24 board of transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz and J. W. Johnson, secretaries of said board, their deputies, clerks, and servants, being enjoined and restrained from entertaining, hearing or determining any complaint against the said company for or on account of any act or thing by it or its officers, agents, servants or employees done, suffered or omitted, which may be commanded or forbidden by said act and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding civil or criminal against said company or their officers, agents, servants or employees, done or omitted which may be forbidden or commanded by said act and particularly from reducing the rates of charge for transportation of freight made by them on the 31st day of July last past to those prescribed by said act and that the said attorney be in like manner enjoined from bringing or aiding in bringing or causing or advising to be brought any proceeding by way of injunction or mandatory or other process or civil action or indictment against said company for or on account of any act of ommission on their part commanded or forbidden by said house roll 33.

3. That the county attorneys of this State and all others persons be and they are hereby restrained and enjoined from instituting or prosecuting or causing to be instituted or prosecuted such actions

or proceedings or any of them, and that the plaintiffs have leave to insert the names of any such persons threatening to take such proceeding and take further order directed to him enjoining him as aforesaid. This order shall remain in force until a formal motion for injunction or to set aside this order be made, heard and decided, bond to be given in the sum of $10,000.

ELMER S. DUNDY, *Judge.*

3 Aug., 1893

25 Thereupon afterwards, to wit: on the 2nd day of September, 1893 an answer was filed in said case, which said answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES C. STARR and SAMUEL W. ALLERTON, Complainants,
v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph S. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands and Buildings, Officers of the State of Nebraska; William A. Dilworth, J. M. Kountz, and J. W. Johnson, Secretaries of said Board, Defendants.

Answer in Equity.

To the honorable the judges of the circuit court of the United States for the district of Nebraska.

The joint and several answer of Geo. H. Hastings, attorney general; John C. Allen, secretary of state; Eugene Moore, auditor of public accounts; Joseph F. Bartley, State treasurer, and A. R. Humphrey, commissioner of public lands and buildings, officers of the State of Nebraska and constituting the board of transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz, and J. W. Johnson, secretaries of said board.

The defendants now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of com-
26 plaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants for answer say:

I.

True it is that said Geo. H. Hastings is the attorney general, John C. Allen is the secretary of state, Eugene Moore is the auditor of public accounts, Joseph S. Bartley is the State treasurer, and A. R. Humphrey is the commissioner of public lands and buildings, and

are each duly qualified and acting, and constitute the board of transportation of the State of Nebraska, and that William A. Dilworth, J. M. Kountz and J. W. Johnson, are the secretaries of said board. But these defendants allege that they and each of them and all of them are officers and agents of said State of Nebraska, and have no personal or pecuniary interest whatever in the event of this suit, or in the result of the several matters and things charged and set forth in said complainants' bill of complaint herein filed, and are not proper parties thereto, but that said bill of complaint should of right have been brought against the State of Nebraska, and not against these defendants, or either of them, and that the said State of Nebraska is the real party in interest, and that said State of Nebraska hath not and doth not in any way whatever consent to the bringing of this action, and hath not and doth not submit in any way to the jurisdiction of said court to hear and determine the several matters in difference charged and set forth in complainants' bill of complaint, and these defendants submit that under the eleventh amendment of the Constitution of the United States, the courts of the United States are wholly without jurisdiction to try, hear and determine the several matters in difference charged and set forth in said complainants' bill of complaint and that under the Constitution of the United States, and constitution and laws of
27 the State of Nebraska, said complainants have a full, complete and adequate remedy at law for all the matters alleged and set forth in said complainants' bill of complaint..

II.

Further answering, these defendants say that true it is that said complainants herein are, and for six months last past have been stockholders and bond-owners of the said defendant, The Chicago, Rock Island & Pacific Railway Company, but deny that the amount is as set forth and charged in said complainants' bill, but these defendants allege and charge the truth to be that soon after the passage and signing by the governor of house roll 33, commonly known as the Newberry bill, which is mentioned and described in said complainants' bill of complaint, these complainants entered into a conspiracy to and with the said defendant railway companies and their officers and managers, whereby a plan was devised with the end in view to defeat the legislation so as aforesaid had and prevent the carrying into operation the said bill and the several provisions and commands thereof, and at the same time to avoid the penalties and forfeitures therein prescribed during the pendency of the litigation, and to have the same declared unconstitutional by a decree of this court, and in order to give this court jurisdiction thereof the said Chicago, Rock Island & Pacific Railway Company, and its officers and managers did procure to be made, a pretended demand upon the president and board of directors of the defendant railway company, that said officers should decline to put the rates prescribed by said house roll 33 in operation in the State of Nebraska, and to test the constitutionality of said house roll 33 in the courts. That said defendant railway company pretended to refuse

such demand, but these defendants aver that while said railway company, its officers and managers pretended to refuse such
28 demands, or to accede to said requests, —have in fact complied therewith, and the said railway company defendant, still confederating and conspiring to and with said complainants, procured said complainants and each of them to institute this action in this honorable court and to procure an order of injunction herein against the said railway company to be issued out of this court preventing and prohibiting said railway company from putting into operation the rates mentioned and set forth in said house roll 33, and from carrying into effect any of the provisions and requirements of said law.

III.

These defendants further answering say, that The Chicago, Rock Island & Pacific Railway Company, one of the defendants herein was originally organized under the laws and chartered by the State of Illinois in 1849 as the Chicago & La Salle Railroad Company, for the purpose of building a line of railroad from the city of Chicago to La Salle in said State.

In February 1851 a new charter was obtained from the State and the name changed to the Chicago & Rock Island Railroad Company, with power to build from Chicago to the city of Rock Island in said State. The road was completed to said city of Rock Island in 1854.

In 1852 the Mississippi & Missouri River Railroad Company was chartered by the State of Iowa for the purpose of building a railroad from a point in said State on the Mississippi river opposite the city of Rock Island in the State of Illinois to a point on the Missouri river at or near the city of Council Bluffs, Iowa.

In 1866 the Chicago & Rock Island Railroad Company and the Mississippi & Missouri River Railroad Company were consolidated under the name of the Chicago, Rock Island & Pacific Railroad Company, and the road completed to the city of Council Bluffs in 1869.

On the 14th day of June, 1880 the Chicago, Rock Island &
29 Pacific Railroad Company was consolidated with the South Chicago branch, a corporation of Illinois, and the following railroads of the State of Iowa, the Washington branch, the Iowa Southern & Missouri Northern, Atchison branch, Indianola branch, the Newton & Monroe, the Atlantic, the Avoca, Macedonia & Southwestern and the Atlantic & Audobon railroads. The new consolidation took the name and constituted The Chicago, Rock Island & Pacific Railway Company, and is one of the defendants in this action.

By the terms of the consolidation the holders of the shares of the respective companies were entitled to and did receive two shares in the consolidated company for every share held by them in the old companies. The authorized shares of capital of the new company, to wit, the Chicago, Rock Island & Pacific Railway Company was $50,000,000, the amount of stock issued under and by virtue of the articles of consolidation was $41,960,000.

In April, 1883, the Chicago, Kansas & Nebraska Railroad Company was incorporated under the laws of the State of Nebraska with a capital stock of $15,000,000 for the purpose of building a line of road from the south line of Pawnee county, Nebraska, in a northwesterly direction to the city of Beatrice in said State; and thence southwest to the south line of Jefferson county, Nebraska; with a branch line from the city of Fairbury to Nelson, in Nuckolls county, Nebraska. The capital stock in this company was increased in 1887 to $30,000,000, and the road completed upon the lines as aforesaid, for a distance of about 142 miles in this State. It also built a line of road in Kansas & Colorado.

The municipalities through which this road ran voted aid in its construction to a large amount. In Nebraska $185,000 while the amount voted in Kansas is to these defendants unknown, but is considerably larger than the amount voted in Nebraska.

30 The Chicago, Rock Island & Pacific Railway Company on order to obtain money to aid the Chicago, Kansas & Nebraska Railroad Company to obtain its equipment and construct its line of road, issued and sold on the market what it terms "extension bonds" to the amount of $20,000 per mile of road to be so aided.

To secure the Chicago, Rock Island & Pacific Railway Company for the money it had advanced to aid in the obtaining of such equipment and the construction of its road, the Chicago, Kansas & Nebraska Railroad Company issued and delivered to said Chicago, Rock Island & Pacific Railway Company its bonds to the amount of $20,000 per mile of its road, and at the same time and for the purpose of securing the payment of said bonds, and also to secure the payment of the "extension bonds" issued as aforesaid by the Chicago, Rock Island & Pacific Railway Company the said Chicago, Kansas & Nebraska Railroad Company issued and delivered to the Chicago, Rock Island & Pacific Railway Company a mortgage on all its equipments, road-bed, depots, franchises and property of every description belonging to or appertaining to the Chicago, Kansas & Nebraska road.

And these defendants further say upon information and belief that the total amount of "extension bonds" issued as aforesaid by the said Chicago, Rock Island & Pacific Railway Company is about $33,000,000, and that the bonds of the Chicago, Kansas & Nebraska Railroad Company, issued as security therefor, as aforesaid *was* of equal amount. And that the number of miles so added as aforesaid was about 1,650.

In 1890 the Chicago, Rock Island & Pacific Railway Company caused suit to be brought in the United States circuit court for the district of Kansas against the Chicago, Kansas & Nebraska Railroad Company, the object of which suit was to foreclose so much of the mortgage given as aforesaid as secured the bonds issued

31 by the Chicago, Kansas & Nebraska Railroad Company, as security for said "extension bonds" of the Chicago, Rock Island & Pacific Railway Company.

Decree of foreclosure was obtained, and all the rights, franchises, rolling stock and equipments of every kind of the said Chicago,

Kansas & Nebraska Railroad Company were sold under and by virtue of said decree in April, 1891, to the Chicago, Rock Island & Pacific Railway Company. That by reason of such foreclosure all the capital stock and all the bonds issued as aforesaid of said Chicago, Kansas & Nebraska Railroad Company became extinguished, and the "extension bonds" issued by the Chicago, Rock Island & Pacific Railway Company, secured by mortgage on the property, franchises, rolling stock and equipments of the Chicago, Kansas & Nebraska Railroad Company became the first lien upon said property.

And these answering defendants aver that the total consideration paid by the Chicago, Rock Island & Pacific Railway Company for the property, franchises and equipments of the Chicago, Kansas & Nebraska Railroad Company was the amount of money advanced by the Chicago, Rock Island & Pacific Railway Company to aid in the Chicago, Kansas & Nebraska Railroad Company in the construction of said road, and the purchase of equipments therefor, which sum these defendants allege is materially less than the amount of said "extension bonds" and does not exceed the sum of $15,000 per mile of said road.

These answering defendants further say, that at a meeting of the directors of the Chicago, Rock Island & Pacific Railway Company, held in the city of New York in the State of New York on the 28th day of November, 1888, the following resolutions were unanimously adopted:

"Resolved That the president of this company be, and he is hereby, directed and authorized to file with the secretary of state of the State of Nebraska a true copy of the articles of association
32 of this company, for the purpose of enabling this company to avail itself of the benefit of an act of the legislature of the State of Nebraska, entitled 'An act relating to the purchase, lease and sale, or aiding of railroads in certain cases, and to the ratification of prior leases, sales or consolidations." Approved March 14th, 1887.'

"And resolved further, That process may be served upon the officers or agents of the Chicago, Rock Island & Pacific Railway Company in the State of Nebraska, engaged in *the* transacting the business of said company, in the same manner as may be provided by law for the service of process upon railroad corporations of the State of Nebraska, and that a certified copy of these resolutions be filed with the secretary of state of the State of Nebraska."

A certified copy of the above resolution, together with the charter and articles of consolidation whereby the said The Chicago, Rock Island & Pacific Railway Company became organized was filed with the secretary of state of the State of Nebraska on the 4th day of January, 1889, in pursuance to and in accordance with the foregoing resolution.

And afterwards, to wit, at a meeting of the board of directors of the Chicago, Rock Island & Pacific Railway Company, held at the office of the company in the city of Chicago, State of Illinois on the

11th day of April, 1890, the following preamble and resolutions were adopted:

"Whereas for the purpose of enabling it to become a domestic corporation of the State of Nebraska, the Chicago, Rock Island & Pacific Railway Company has accepted and does hereby accept the provisions of an act of the legislature of the State of Nebraska entitled 'An act to enable foreign corporations to become domestic corporations of this State.' Approved March 18th, 1889. Resolved further that a certified copy of this resolution be filed with the
33 secretary of state of the State of Nebraska."

A copy of the above resolution was filed in the office of the secretary of state of the State of Nebraska on the 14th day of April, 1890, whereby the said The Chicago, Rock Island & Pacific Railway Company became a domestic corporation of the State of Nebraska, subject to all the rules, laws, and regulations of said State in every respect.

In 1890, the said, The Chicago, Rock Island & Pacific Railway Company constructed a line of road from South Omaha, Nebraska, to the city of Lincoln, Nebraska, a distance of 54 miles, and from said city of Lincoln southwest to a connection at or near the city of Fairbury, Jefferson county, with the line of road above described as having been built in this State by the Chicago, Kansas & Nebraska Railroad Company, a distance of about 65 miles; the total mileage of the Chicago, Rock Island & Pacific Railway Company, at the time of the filing of this bill of complaint herein, in this State was 257 miles.

And your defendants further answering say that the lines of railway within the limits of the State of Nebraska, claimed to be owned and operated by the Chicago, Rock Island & Pacific Railway Company are lines which have been constructed under and by virtue of corporations organized and existing under and by virtue of the laws of the State of Nebraska, and the said, The Chicago, Rock Island & Pacific Railway Company, and the said lines of road are in all respects subject to the constitution and the laws of the State of Nebraska.

IV.

And these answering defendants for a further answer deny that the maximum rate bill spoken of in the complainant's bill of complaint and therein being spoken of as house roll 33 violates the provisions of the Constitution of United States which forbids any
34 State to deprive any person of his property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, or to pass a law impairing the obligation of a contract, or which interferes with commerce between the States. And these defendants further deny that the enforcement of said house roll 33 will operate in any way as a confiscation of the property of said railway company, and denies that said house roll 33 is in violation of the constitution prohibiting the taking of property for public use without compensation or without due process of law; but upon the contrary aver and say that the

rates therein fixed are reasonable maximum rates, and that the lines of railroad owned and operated by the Chicago, Rock Island & Pacific Railway Company within the limits of the State of Nebraska by a compliance with and faithful obedience to the provisions of house roll 33 will earn as much money as it has heretofore earned, and will earn a sufficient amount of money to pay a reasonable profit upon the amount of money invested in the construction and equipment of said lines of road, as well as interest upon its legitimate funded debt, and also a dividend upon its legitimate outstanding stock.

In this connection these answering defendants further say, that the capital stock of the Chicago, Rock Island & Pacific Railway Company and the bonded debt thereof exceeds a sum of money which would be necessary to reproduce the same or a like system of property, and say that the capital stock and bonded debt of the Chicago, Kansas & Nebraska Railroad Company exceeds a sum which would be necessary to reproduce the same or a like system of property, and deny that said stock and bonds or either of them represent the true cost or value of either of said respective railroads, but upon the contrary these defendants aver that the capitalization and funded debt secured by mortgage of the respective rail-
35 road companies is much in excess of the real cost of said property, and does not represent money actually invested in the construction and equipment of their various lines of road, and say that the said lines of road within the limits of the State of Nebraska did not cost to construct and equip the same as these respondents are informed and believe, a sum exceeding $15,000 a mile; and these defendants upon information and belief further say that the said lines within the limits of the State of Nebraska can be reproduced and equipped at a sum of money not exceeding $15,000 per mile.

V.

These defendants, in this connection further answering say, upon information and belief, that the capital stock of the Chicago, Rock Island & Pacific Railway Company does not represent money invested in the construction and equipment of its said lines of property, and that the owners and holders of its said stock did not pay to the railway company in money, or other consideration the face value of said stock; and further say that said stock was issued largely for the purpose of absorbing the surplus earnings of said company in the form of dividends and for the purpose of having it appear to the public that excessive dividends were not being paid.

A statement of the capital stock of the Chicago, Rock Island & Pacific Railway Company is hereto attached as Exhibit "A" and made a part hereof.

And notwithstanding the fact that said large amount of capital stock did not represent any money actually invested in said company in the construction and for the equipment of roads, yet the said railway company has been for a long series of years earning sufficient to pay all its operating expenses together with interest

upon its large funded debt, and a dividend of from 5 to 10 per cent. annually upon its stock all of which more particularly ap-
36 pears in Exhibit "B" hereto attached and made a part hereof.

And in this connection defendants further aver that if the payment of cash dividends had been confined to the stock which actually represented cash invested in the railway company for the construction and equipment of its lines of road that the net earnings would have paid annually from 20 to 25 per cent., including interest upon the outstanding funded debt.

In this connection these defendants further say that the funded debt of the Chicago, Rock Island & Pacific Railway Company, at the time of its creation by the consolidation aforesaid, was reported as $10,000,000 and in 1892 as $55,352,000, and these defendants say that if the funded debt of said company is as last above stated that the same is vastly in excess of the cost or value of said railway company, and that said funded debt does not represent the real cost or value of the lines of road of said railway company, and that a like system of lines of road could be constructed and equipped in as equally a good manner for a much less sum of money than that represented by the funded debt alone; whereby said railway company is not entitled to claim that it should receive enough money, over and above its operating expenses, to pay the interest on its excessive funded debt, and likewise to pay a dividend upon so large an amount of capital stock, in so far as the same does not represent the value of its said road.

VI.

These defendants further answering say, that the respective Iowa railroad companies, which became and constitute part of the system of the Chicago, Rock Island & Pacific Railway Company received large quantities of land from the State of Iowa, the total amount being over one million acres, for which the Chicago, Rock Island Railway Company, or its constituent companies received over
37 twelve dollars per acre, making a total of $12,000,000 received for the land granted by said State to aid in the construction of said road.

VII.

The answering defendants for further answer say, that they have no definite and positive knowledge as to the earnings of the Chicago, Rock Island & Pacific Railway Company upon its roads within the State of Nebraska, for the year 1892 and have no definite and positive knowledge as to the amount of the operating expenses, taxes, renting of tracks, interest on bonds and sinking-fund payment, of the Chicago, Rock Island & Pacific Railway Company for the said year 1892, but upon information and belief aver, that in anticipation of the passing of a maximum freight bill, and to avoid the payment of what might appear to be a large dividend upon its capital stock, — did purchase an unusual-large amount of engines and other rolling stock, and did invest a large amount of money in other repairs and improvements with a view of having it appear that the

operating expenses were large, and the dividend to be paid upon the stock comparatively small.

In this connection these defendants further say, that in determining whether or no the company was receiving reasonable profit over and above its investment and operating expenses, there should not have been deducted or taken into account the large sum representing interest paid upon the bonds of said road, for the reason that said bonds did not represent the real cost or value of its road within the State of Nebraska, as has been hereinbefore more particularly set forth.

These defendants further answering say and allege the truth to be that at least one-half of the tonnage, carriage and transportation upon the several lines of the Chicago, Rock Island & Pacific railway in the State of Nebraska consists of grain hauled to
38 eastern markets on a through interstate rate, which has heretofore been placed at a very low figure as compared with the local or State rate, thereby causing local or State business to bear an unjust proportion of freight charges, and which excessive charges for local and State business have been made by the management of the Chicago, Rock Island & Pacific Railway Company in order to yield a large profit on the business of its lines; and by way of illustration say, that for two years last past, and during the year 1892 corn was hauled from the State of Nebraska to Chicago Illinois at an average of 7 mills per ton per mile, while for local tonnage it was 1.359 cents, being nearly double that of the interstate rate on corn.

And these defendants allege that the local rate should not be placed at a high figure as compared with the interstate rate, for that such high rate for local business is unjust and works a great wrong and hardship to the people of this State of Nebraska, and is a discrimination against local shippers, and that it has been the policy of the management of the company at all times to make a low through interstate rate and to charge an unreasonable and unjust local rate upon shipments originating and ending within the State; and that the same applies to passenger traffic in that the local traffic is charged with high rates, and large items of expense in order to support service for the accommodation of through travel.

These defendants further allege that it is the custom of the Chicago, Rock Island & Pacific Railway Company to run certain freight trains for the purpose and accommodation solely of through or interstate freight. That said freight trains stop only at division stations within the State, and that the expenses of running said trains and each and all of them are charged against the lines of road within the State of Nebraska; yet true it is that said through trains do not
39 do any business of any amount whatever within the said State of Nebraska, except to transport freight originating beyond the boundaries of the State and being carried to points also beyond the limits of the State of Nebraska: Whereby the fixed charges and operating expenses of the line within the State of Nebraska are made to appear much larger than they are in fact, and which said charges and operating expenses for the transportation of freight on said through trains (no part of which originates within,

or is delivered to any point within the State of Nebraska) should not be added or computed in determining the cost of the fixed charges and operating expenses for transporting local freight within the limits of the State, and that it is unjust and unfair to make high charges for local freight for the purpose of paying the operating expenses and fixed charges for such other traffic hereinbefore described.

VIII.

These defendants further answering say that at the time the Chicago, Rock Island & Pacific Railway Company obtained and built its lines of road in Nebraska, there existed in the constitution of the State of Nebraska, and still does exist the following provision, being section 4 of article 11:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed be law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in the State."

That at the session of the legislature of the State of Nebraska, for the year 1893, said legislature being advised and informed that the rates heretofore charged by the Chicago, Rock Island & Pacific Railway Company, and other railway companies for the transportation of freight, were excessive and *and* unreasonable, and that by reason of the matters and things hereinbefore set forth, and by reason of other information by said legislature had, as the result of its own wisdom, investigation and inquiry, did pass the law complained of, in which it is provided, among other things—

"That each of the railroads in the State of Nebraska shall charge, for the transportation of freight from any point in the State to any other point in said State, no higher or greater rate of charge, that is by this act fixed as the reasonable maximum rate for the distance hauled, and the reasonable maximum rates for the transportation of freight by railroad from any point in the State of Nebraska, to any other point in said State are declared and established to be as hereinafter in this section fixed for the distance named and any higher or greater rate for the distance hauled than that herein fixed and established, is prohibited and declared to be unlawful; and the reasonable maximum rate herein fixed and established shall be known as the Nebraska schedule of reasonable maximum rates."

These defendants aver and say that said legislature was clothed with the power and authority to investigate and determine and by law established what should constitute reasonable maximum rates for the transportation of freight, and to so declare by law by the said legislature is conclusive and binding upon all parties, and is not subject to investigation or revision, except by the legislature of the State, or in such other manner as the State legislature may by

law provide. And in this connection these defendants further aver that said maximum rates so established by said law are reasonable in fact. These defendants aver upon information and belief that the Chicago, Rock Island & Pacific Railway Company, and other railway companies within the State of Nebraska, by compliance with and submission to said law will receive sufficient earnings
41 to pay a good and reasonable profit to them respectively.

And these defendants further answer and say: That said house roll 33 did not take effect and become a law of the State of Nebraska until the 1st day of August, 1893.

That the defendant railway company herein, The Chicago, Rock Island & Pacific Railway Company, did not on the 1st day of August, 1893, nor at any time since, place the rates as set forth in said house roll 33 in force upon any part of its line of road in this State, and that said defendant railway company has never carried any freight along the line of its road in this State, or any part of said line, in compliance with the provisions of said house roll 33.

IX.

And these defendants further answering allege that the rate for the transportation of freight within the State of Nebraska upon the several lines of railroad doing business therein, as fixed by house roll No. 33, are a uniform reduction from the local rates before this time in force within this State, for a long period of years, and while it may appear that the rate fixed is a small charge for hauling 25 pounds of freight five miles, yet by a reference to the published schedule prices of the Chicago, Rock Island & Pacific Railway Company for the hauling of freight within the State of Nebraska which has been in full force and operation within this State for a long series of years last past, it will be found to be only a fraction of a cent lower than the published, posted and established rates made by the said railroad companies and in force and operation in this State.

Classes D and E are classes provided for in said house roll No. 33, and consist of such articles as sand, stone, and the like, which are exceedingly heavy and are of small value. True it is that
42 by the provisions of said house roll No. 33, the rate on lumber is higher for 85 miles, than for 125, as the same appears upon the face of said bill, but the same is an error in the transcribing of said bill, and is one of those discrepancies, or errors that the said board of transportation, under the provisions and requirements of said house roll No. 33, has full power and lawful authority to correct. That by the terms, conditions and provisions of said house roll No. 33, it is provided:

"That the board of transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act whenever it shall seem just and reasonable to a majority of said board so to reduce any rate; and said board of transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this act established, whenever it shall appear to a majority of said board just

and reasonable to revise said classification; provided, that said board of transportation shall never change the classification in this act established, so that by such change of classification, the rates on any freight will become higher or greater than in this act fixed."

And these defendants deny that the said Chicago, Rock Island & Pacific Railway Company, or any other railroad company, doing business in the State of Nebraska, have a right to discriminate against any person, thing or place in the matter of freight charges, or charges for the transportation of passengers within this State by carrying freight for one person, or from one place, at less than the actual cost of such carrying, and then charge some other person for carrying or transporting freight for him from another place, more than a reasonable rate, in order to cover the loss upon the lower rate.

43 And these defendants deny that under the provisions of house roll No. 33, property will be taken for public use without just compensation, or without due process of law, and aver that the said Chicago, Rock Island & Pacific Railway Company, its stockholders, bondholders, officers, managers and employees are estopped from denying the reasonableness of rates for the transportation of freight which have been in force and effect by the voluntary action of the said officers, managers, and agents of the said railroad companies within the State of Nebraska, for a long period of years last past, and which have been in many instances lower that the rates fixed by house roll No. 33.

X.

These defendants further answering deny that the rates for the transportation of freight as fixed by house roll No. 33 are lower than the rates in neighboring States similarly situated to the State of Nebraska; and these defendants further say that they have no knowledge as to the correctness of the tabulated statement referred to in the bill of complaint touching the comparison of rates between Nebraska and the States of Wyoming, Minnesota, Dakota, and Kansas, and therefore deny the same, and leave the complainants to their proof in that regard; but upon the other hand these defendants say that the maximum rates fixed in Nebraska upon many commodities is much higher than the rates permitted in any of the last four named States; and further say that there are various considerations which enter into what would constitute a reasonable maximum rate in the said last four named States, which would not and do not apply to the State of Nebraska. These defendants submit herewith a table showing the maximum rates for carrying freight in the State of Nebraska, and in the State of Iowa, a State similarly situated to the State of Nebraska, and which is hereunto attached and marked Exhibit "D" and

44 from which — it made to appear that the maximum rates fixed for the State of Nebraska are considerable higher that the rates fixed for the State of Iowa; and the defendants allege that the railroads in the State of Iowa since the reduction of rates upon freight in that State have earned as much money and have paid as large

dividends as said railroads paid before such reductions were made; and that defendants believe that the railroads within the State of Nebraska would earn as much money and pay as large dividends if they would submit to comply with the present maximum rate law as they have heretofore. That the State of Nebraska for ten years and upwards last past has been steadily increasing in population, thereby increasing the tonnage and passenger traffic upon the several lines of roads doing business in this State, and that there is every reason to believe that said increase in population and railway traffic will continue for a great many years to come.

XI.

These defendants further answering deny that house roll No. 33 excludes every mode of inquiry into the reasonableness of any of the schedule rates prescribed therein, and deny that said rates are absolute and arbitrary, but say that all such matters are subject to inquiry and investigation, and is provided in said law as follows, to wit:

"Whenever any railroad company or companies in this State shall, in a proper action, show by competent testimony that the schedule of rates prescribed by this act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom, as hereinafter provided. All such actions shall be brought before the supreme court, in the name of the railroad company or companies, bringing the same, and against the State of Nebraska and upon the hearing thereof if the court shall become satisfied that the rates
45 herein prescribed are unjust in so far as they relate to the railroad bringing the action, — may issue their order directing the board of transportation to permit such railroad to raise its rates to any sum in the discretion of the board, provided that in no case shall the rates so raised be fixed at a higher sum, than that charged by such railroads on the first day of January, 1893."

And these defendants allege that the rates which were in force on January first, 1893, upon the several lines of the Chicago, Rock Island & Pacific system doing business in the State of Nebraska, have been in force a time sufficiently long to determine their reasonableness and the profits of the railroad companies received thereunder in the transaction of their business, whereby said several railroad companies are estopped from denying that such rates in force on the first day of January, 1893, were so low as to be unreasonable or unjust in that respect.

These defendants further say that under another section of said act, hereinbefore quoted, the board of transportation is empowered and directed to revise the classification of freight in said act established whenever it shall appear to a majority of said board just and reasonable to revise said classification.

These defendants further say that under an act of the legislature of the State of Nebraska, entitled, "An act to regulate railroads, to prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled, Railroads, of the Revised Statutes, and all acts and parts of

acts on conflict herewith," which was approved in the year 1887, the State board of transportation, was created, organized and established, of which these defendants are the members, it was made and is the duty of said board of transportation, composed of the auditor of public accounts, the State treasurer, the secretary of state,
46 the commissioner of public lands and buildings, and the attorney general of the State of Nebraska, to try, hear and determine all complaints made to said board, by any and all persons complaining of anything done or omitted to be done by any railroad company in said State in contravention of any of the provisions of said act, and to inquire into the question of freight rates and charges, and other matters and things in said act provided, and that in the procedure under said act, the railway companies are entitled to have, and must receive, notice, and entitled to introduce evidence, and to have their day in court, and that after such investigation and hearing, should the judgment of the board of transportation be adverse to the said railway company, they have a right to appeal from such judgment of the board of transportation to the judicial tribunals of the State.

XII.

These defendants for further answer deny that the provisions of said act exempting certain railroads from its operations to wit, as follows:

"All railroads or parts thereof which have been built in this State since the first day of January, 1889, or may be built before the 31st day of December, 1899, shall be exempt from the provisions of this act until the 31st day of December, 1899," is unconstitutional and is an unlawful discrimination against other railroad companies; and in this connection the defendants further say that under and by virtue of the terms of the constitution of the State of Nebraska, the legislature of the State was empowered and authorized to establish maximum rates of charges for the transportation of freight on the different railroads, and that the legislature was not required to provide that said maximum rate should be the same upon each and all of the roads within the State of Nebraska.

XIII.

47 These defendants further answering deny that the said board of transportation on or about the first of August, 1891, or at any other time, found or determined that the local freight rates for the shipment of freights within the limits of Nebraska, were either reasonable, just or warranted; and these defendants further answering say, that since said date, the condition of affairs in the State of Nebraska has vastly changed, and that what was a reasonable maximum rate at that time, would be an unjust, unreasonable, and unwarranted rate at this time; and that since said time the tonnage of freight, as well as passenger traffic has greatly increased within the limits of the State of Nebraska, whereby the same can be transported at lower rates; and further that the values of all farm products and manufactured articles, as well as labor, has become

reduced since 1891, by reason whereof the cost of transportation should likewise be reduced, and that, notwithstanding all the foregoing facts, the interstate-commerce rates upon the railroads in the State of Nebraska upon grain, coal, live stock, lumber, merchandise, and upon nearly all the commodities that the people of the State of Nebraska ship out of or into the State, have been raised about four cents per hundred pounds, thereby increasing the revenues and income of said railway company; while upon the other hand the said railway company has made no corresponding reduction upon the local rates within the State, but which should have been reduced for the reasons hereinbefore stated.

XIV.

These defendants further answering admit that the Chicago, Rock Island & Pacific Railway Company own different lines of road, most of which have one of their terminals at Fairbury, in the State of Nebraska, and running in different directions through the
48 State, whereby and by reason whereof, the city of Fairbury within the State of Nebraska is made a general distributing point by the said railroad companies for their different lines. And these defendants in this connection deny that the various lines of road are operated together as a continuous and connecting line, and deny that the carriage and shipment of freight over the said roads is a continuous carriage by the same cars, trains, engines and crews of men, but upon the contrary say that all trains of cars arriving at the city of Fairbury are there abandoned, and all freight is there redistributed and new trains of cars are made up with new crews of men and with different engines, practically as much so, as if each and all of the said several lines of road were operated by independent corporations.

These defendants further say that if there be intermingled in the same cars or trains of cars local freight and interstate-commerce freight, the same is the voluntary act of the said company; and the defendants further answering say that the said railroad company cannot by the voluntary intermingling of interstate freight with local freight, take away from the jurisdiction of the State of Nebraska its constitutional and inherent power to establish a reasonable maximum freight rate for local business.

Nor can said company by intermingling of freight withdraw itself as a body corporate from the regulation and control of the general State government.

XV.

These defendants for further answer say that said house roll No. 33, was duly passed by the house and senate, composing the legislature of the State of Nebraska, in strict conformity to law, and in obedience to the requirements of the constitution of the State of Nebraska, and after such passage was duly signed and ap-
49 proved by the governor of the State of Nebraska, in form and manner as prescribed by the constitution and laws of the

State of Nebraska; and that under and by virtue of the laws and of the constitution of the State of Nebraska, the same became a law and of full force, virtue and effect; and these defendants deny that the bill for said act was not read at large in the house on three separate days, and deny that the said bill was put upon its passage without being so read, and deny that divers radical changes were made in said bill without the action or knowledge of the said house; and deny that the said bill was erroneously engrossed; and deny that said bill was not read at large on three different days in the senate and deny that said bill was put upon its passage in the senate without being so read; and deny that in the enrollment of said bill that changes were made therein; and upon the contrary say, that the bill as signed by the governor was the same bill as passed by the two houses composing the legislature.

These defendants further answering, deny that said house roll 33 in any way amends, alters, changes, adds to or abridges said act entitled "An act to regulate railroads, to prevent unjust discrimination, provide for a board of transportation, to define its duties, and repeal articles 5 and 8 of chapter 72, entitled 'Railroads,' of the Revised Statutes, and all acts and parts of acts in conflict therewith," approved March 31, 1887, or any part thereof, but aver that said house roll 33 is an act entire of itself, referring to and dependant upon no other law of the State of Nebraska, except the constitutional provision found in section 4, of article 11.

XVI.

These defendants deny that the board of transportation ever determined to reduce the rates on certain classes, and commodities in the schedule of rates fixed in said act, below the rates therein particularly described, as charged in the bill of complaint, and deny that said board of transportation has determined to revise the classification of rates in said act established, and deny that the rates in said act established will reduce the earnings of any of the railroads in the State of Nebraska as in the bill of complaint averred, or in any other sum whatsoever, and deny that the enforcement of said maximum rate will in any manner whatsoever operate to confiscate the property of any of the railroads within the State of Nebraska or of complainants; and further deny that the board of transportation intends to do any matter or thing other than that which it is their duty to do, to the end that the said law may be enforced.

And in this connection the defendants do admit that they mean and intend to see that the provisions of said law are enforced, and that the respective railroad companies within the State of Nebraska shall submit to the provisions of said law, and to that end admit that they intend to do and mean to do whatever things may be proper, lawful and expedient to do looking toward a faithful enforcement of said law and the subjection of the railway companies to the provisions thereof; but in this connection further deny that they ever contemplated, threatened or intended to bring any action

or institute any suit or proceeding, prosecution or indictments against any of the respective railway companies, their officers, agents or employés, unless such railway company or companies, through their officers, agents and employés violated one or more of the provisions of said law, but in which event they admit that they would do whatever should be lawful for them to do under the provisions of said law looking to the enforcement thereof.

And these defendants say that if there is any other matter, cause or thing in the bill of complaint contained, material or necessary for these defendants to make answer unto and not herein and
51 hereby well and sufficiently answered, confessed, traversed and avoided or denied, the same is not true to the knowledge and belief of these defendants, all which matters and things these defendants are willing to aver, maintain and prove as this honorable court shall direct.

And these defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred to the said bill of complaint.

And these defendants pray leave to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

GEO. H. HASTINGS,
W. A. DILWORTH,
Attorneys for Defendants, Except the Chicago, Rock Island & Pacific R. R. Co.

JOHN L. WEBSTER, *Of Counsel.*

Attached to said answer are papers in words and figures following, to wit:

52

EXHIBIT "A."

Statement Showing Mileage Owned, Capital Stock, and Funded Debt of the Chicago, Rock Island & Pacific Railway Company from Date of Organization to 1892, Inclusive.

Date.	Miles owned.	Capital stock issued.	Funded debt.
1863	228	5,603,000	1,467,000
1864	228	6,000,000	1,397,000
1865	228	6,000,000	1,397,000
1866	228	6,500,000	1,397,000
1867	365	9,100,000	8,099,524
1868	408	14,000,000	8,230,000
1869	524	14,000,000	8,772,000
1870	544	16,000,000	8,773,000
1871	544	17,000,000	8,717,000
1872	565	18,990,000	8,698,000
1873	591	20,500,000	8,972,140
1874	591	20,980,000	9,000,140
1875	612	20,980,000	9,000,140
1876	637	20,980,000	10,000,100
1877	637	20,980,000	10,000,100
1878	637	20,980,000	9,998,100
1879	703	20,980,000	9,982,000
1880	1,052	20,980,000	10,000,000
1881	1,121	41,960,000	17,500,000
1882	1,121	41,960,000	17,500,000
1883	1,121	41,960,000	17,500,000
1884	1,121	41,960,000	17,500,000
1885	1,121	41,960,000	20,000,000
1886	1,121	41,960,000	21,460,000
1887	1,121	21,400,000	29,360,000
1888	1,121	46,156,000	41,460,000
1889	1,185	46,156,000	47,720,000
1890	1,186	46,156,000	49,787,000
1891	1,239	46,156,000	52,002,000
1892	2,725	46,156,000	55,352,000

53 EXHIBIT "B."

Statement Showing Rate of Dividends on Stock of Chicago, Rock Island & Pacific Railway Company from 1862 to 1892, Inclusive.

1862, April	1	3
1862, Oct.	1	3
1863, April	1	3
1863, Oct.	1	3
1864, April	1	3
1864, Oct.	1	3
1865, April	1	4
1865, Oct.	1	4
1866, April	1	5
" Oct.	1	5
1867, April	9	5
" Oct.	19	5
1868, Sept.	1	10
1869, April	10	5
" Oct.	18	3½
1870, April	9	3½
" Oct.	17	4
1871, April	11	4
" Oct.	20	4
1872, April	22	4
" Oct.	21	4
1873, April	26	4
" Nov.	26	4
1874, April	27	4
" Oct.	27	4
1875, April	23	4
1876, Oct.	23	4
" April	23	4
" Oct.	27	4
1877, Feb'y	—	2
" May	1	2
" Oct.	1	2
" Nov.	1	2
1878, Feb'y	1	2
" May	1	2
" Aug.	1	2½
" Nov.	1	2½
1879, Feb'y	1	2½
" May	—	2½
" Aug.	—	2½
" Nov.	1	2½
1880, Feb'y	1	2½
" May	1	2½
" Aug.	1	1½
" Nov.	—	1½

1881, Feb'y	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1882, Feb'y	1	1¾
" May	1	1¾
" Nov.	1	1¾
1883, Feb'y	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1884, Feb'y	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1885, Feb'y	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1886, Feb'y	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1887, Feb'y	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1888, Feb.	1	1¾
" May	1	1¾
" Aug.	1	1¾
" Nov.	1	1¾
1889, Feb.	1	1
" May	1	1
" Aug.	1	1
" Novem.	1	1
1890, Febr'y	1	1
" May	—	1
" Aug.	—	1
" Nov.	—	1
1891, Febr'y	—	1
" May	—	1
" Aug.	1	½
" Novem.	1	½
1892, Febr'y	1	1
" May	1	1
" Aug.	1	1
" Novem.	1	1

54 Ex. "C."

Table Showing Comparison of Rates by Classes and Cents per Hundred Pounds in Iowa and Nebraska.

In car-loads.

	1	2	3	4	5	A	B	C	D	E
5 miles.										
Iowa.....	14	11.9	9.34	7	4.9	5	4.9	4.2	3.5	2.8
Nebraska.	13	11	9	7	5	5	4	3	3	2
50 miles.										
Iowa.. ..	20	17	13.34	10	7	7.05	7	6	5	4
Nebraska.	24	19	14.5	12	10	10	8	7	5	3.5
100 miles.										
Iowa.....	24	20.4	16	12	8.4	9	8.4	7.2	6	4.8
Nebraska.	29	25	21	20	16	15	10	9	7	5.5
150 miles.										
Iowa.....	32	25.3	19.5	15.3	11.3	12.5	10.7	9.2	7.7	6.4
Nebraska.	41	36	32	29	22	23	14	13	9	6.5
200 miles.										
Iowa.....	40	30.2	23	18.6	14.2	15.9	13	11.1	9.39	8
Nebraska.	55	48	43	36	31	29	20	17	12	8
250 miles.										
Iowa.....	48	35.1	26.5	21.8	17.1	19.2	15.25	13.05	10.99	9.5
Nebraska.	58.5	53	47	41	35	30.5	22.5	18.5	13.5	10
300 miles.										
Iowa.. ...	56	40	30	25	20	22.5	17.5	15	12.5	11
Nebraska.	62	57	52	46	39	32	26	20	15	12
350 miles.										
Iowa.....	58.5	42.5	32.5	27.5	22.5	25	20	17.5	15	13.5
Nebraska.	69	62	57.5	51	40	35	29	23	17.5	13.5
400 miles.										
Iowa..	61	45	35	30	25	27.5	22.5	20	17.5	16
Nebraska.	75	66	62	56	42	40	34	27	20	16

55

In cents per 100 lbs., car-load lots. In cents, per ton.

	Wheat, flour, ed.	Corn, grain, ed.	Lumber.	Salt, lime, cement.	Horses & mules, car-loads.	Cattle, car-loads.	Hogs, car-loads.	Sheep, car-loads.	Coal, hard.	Coal, soft, nut & lump.
5 miles.										
Iowa.....	4.5	3.75	3.5	3.25	5.37	5.13	5.67	8.40	60	30
Nebraska.	4	4	4	3	10.75	9.75	8.50	8.40	60	30
50 miles.										
Iowa.....	6.3	5.25	4.9	4.51	8.75	8.68	8.67	12	96	66
Nebraska.	7	7	7	5.5	17.50	16.50	13	12	96	66
100 miles.										
Iowa.....	8.1	6.75	6.3	5.85	12.5	11.32	10.96	16	1.36	1.00
Nebraska.	10.5	9	6	9	25	21.50	18.00	16.	1.36	1.00
150 miles.										
Iowa.....	9.5	7.9	7.4	6 85	15	13.42	12.8	19	1.70	1.15
Nebraska.	13	11	9	9	30	25.50	21.00	19	1.70	1.15
200 miles.										
Iowa	10.8	9	8.4	7.8	17.5	15.53	14.8	22	2.00	1.30
Nebraska.	14	13	11	13	35.00	29.60	24.00	22.00	2.00	1.30
250 miles.										
Iowa... .	12.15	10.15	9.45	8.8	19.37	17.89	16.9	23.9	2.20	1.40
Nebraska.	14.5	13.5	14.5	15.5	38.75	34.00	28.00	23.90	2.20	1.40
300 miles.										
Iowa	13.53	11.25	10.50	9.75	21.25	20.26	19	25.9	2.40	1.50
Nebraska.	16	14	17	18	42.50	38.50	32.00	25.90	2.40	1.50
350 miles.										
Iowa	14.88	12.4	11.55	10.75	23	21.58	19.62	28.3	2.60	1.60
Nebraska.	17	15	19.5	20.5	46.00	41.00	34.50	28.30	2.60	1.60
400 miles.										
Iowa.....	16.2	13.5	12.6	11.7	24.75	22.89	21	30.3	2.80	1.70
Nebraska.	18	16	22	23	49.50	43.50	37.00	30.31	2.80	1.70
500 miles.										
Iowa.....	18.87	15.70	14.70	13.60	28.15	25.49	22.25	34.3	3.20	1.90
Nebraska.	22	20	27	35	56.50	48.50	42.00	34.70	3.20	1.90

Iowa rate on live stock in cents, per 100 lbs. Nebraska rate in dollars, per car.

Endorsed: Filed Sep. 2 1893 Elmer D. Frank, clerk.

56 Thereupon afterwards, to wit: on the 3rd day of October, 1893, "replication" was filed in said case, which said replication is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

The replication of Samuel W. Allerton and James C. Starr, plaintiffs, to the answer of George H. Hastings, att'y gen'l; John C. Allen, secretary of state; Eugene Moore, auditor of public accounts; Joseph F. Bartley, State treasurer; A. R. Humphrey, comm'r public lands & buildings, defendants.

These repliants saving and reserving to themselves now and at all times hereafter, all and all manner of benefit and advantage of exception, which may be had or taken to the manifold insufficiencies of the said answer for replication thereunto say, that they will aver, maintain, and prove their bill of complaint to be true, certain and sufficient, in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever, in the said answer, contained material or effectual in the law to be replied unto, and not herein or hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are, and will be ready to aver, maintain and prove, as this honorable court shall direct and humbly pray as in and by their said bill they have already prayed.

J. M. WOOLWORTH,
Sol. for Comp'y.

Endorsed: Filed Oct. 3 1893 Elmer D. Frank, clerk.

57 Thereupon afterwards, to wit: on the 6th day of April 1901, "supplemental bill" was filed in said case, which said supplemental bill is in words and figures following, to wit:

In Equity.

To the honorable the judges of the circuit court of the United States within and for the district of Nebraska:

James C. Starr and Samuel W. Allerton, both of the city of Chicago in the State of Illinois and citizens of said State, suing as well on their own behalf as on behalf of all others similarly situated, by leave of court first had and obtained, bring this their bill of complaint against the Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of the States of Illinois, Iowa and Nebraska, against Frank N. Prout, attorney general of the State of Nebraska, and a citizen of said State.

And your orators complain and say:

I.

On or about the 3rd of August 1893, your orators exhibited their original bill of complaint in this honorable court against George H.

Hastings, attorney general, John C. Allen, secretary of state, Eugene Moore, auditor of public accounts, Joseph F. Bartley, State treasurer, and A. R. Humphreys, commissioner of public lands and buildings, constituting the board of transportation of said State, and William A. Dilworth, J. M. Kountz and J. W. Johnson, secretaries of said board, all citizens of said State, therein stating that the said railway company had for twenty years and more been and still was a corporation originally organized and existing under the laws of the States of Illinois and Iowa, and for three years before the filing of said bill, had been incorporated as a domestic corporation under the laws of the State of Nebraska and owned and operated a line of rail-
58 road extending from Chicago through the State of Illinois, to Council Bluffs in the State of Iowa; that in 1890, said company acquired running powers over the bridge and road of the Union Pacific Railroad Company from Council Bluffs to South Omaha in this State, and constructed a line of railroad from South Omaha to Lincoln, from which point to Beatrice, it acquired running powers over the road of the Omaha & Republican Railway Company, and in that year acquired a line of railroad from Rock Island in Illinois, to St. Joseph in Missouri, and thence to the southeast corner of Pawnee county in this State, and thence by way of Beatrice, to Fairbury and from that point to the southwest corner of Fillmore county, and thence through Kansas to Denver, in Colorado; its road in this State being about one hundred and thirty miles in length; and that in that year, the said company established a through line from Chicago to Denver over the roads above described, by way of Omaha to Beatrice and Fairbury; that your orators were and for six months and more before filing said bill had been owners and stockholders of said company, holding six hundred and four shares of its capital stock, each of the par value of $100.00 and that the whole of its stock was distributed among and held by more than 10,000 parties, and that it was impracticable to implead them all in the bill of complaint of your orators; that an act had been lately passed by the legislature of said State of Nebraska and approved by the governor, entitled "An act to regulate railroads, classify freights, fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." That the said defendants threatened, and unless restrained by the order and injunction of this court, they would put in action the full powers of said board under the act above entitled and the other laws of said State, and enforce the commands, injunc-
59 tions and prohibitions thereof, against said company, and further order the attorney general and the county attorneys of the several counties through which said road or any or either of them ran, to institute suits to compel said company to comply with the orders of the said board in that behalf and also apply to the supreme court and the district courts of said State in the name of said State on the relation of said board, for writs of mandamus to compel said company to obey the said orders; and also require the attorney general and the said county attorneys to prosecute said company

for each and every act done or omitted, commanded or forbidden by said statute, and seek to impose upon said company, the severe penalties therein described; which actions and proceedings would be numerous and if effectively prosecuted, would sweep away all of the said company's property; that the attorney general had given notice to said company that it was his purpose and the purpose of said board to enforce all of the provisions of said above-entitled act, promptly, vigorously and to the full extent of the powers conferred upon him and upon the said board in that behalf against any and every railroad company in this State which should in anywise do or omit what in the said laws or either of them is commanded or forbidden and personally to take charge of such proceedings and prosecute them to the full extent of the law; that the roads of said company have never earned upon the business done thereon, their operating expenses and fixed charges; that its administration has been exercised by exceptional skill and judgment and returns from its business were all that the same could be made to render, yet the same had not returned to your orators and its other stockholders, anything upon their capital; that the charges attempted to be fixed in the said act were one-fifth less than those theretofore charged by said company, and that if the said act and the rates therein prescribed should go into operation, the earnings
60 of said company on said roads from its business thereon, and especially from its freight business, would be more than one-fifth less than it has heretofore realized and will not pay the operating expenses thereof, nor yield any money from which the said property may be maintained, and will operate a confiscation of the said property in violation of the provisions of the Constitution of the United States, and of this State against taking property for public use without compensation, and without due process of law; that on the 31st of July prior to the filing of the said bill, your orators learned for the first time what was the nature and effect of the said act, and thereupon requested the president of said railway company to whom the administration of its affairs is largely committed and particularly, the fixing and changing of rates to be charged for the transportation of freight on its roads, to disregard said act and maintain the rates then and thereafter charged by said company without reducing the same to those prescribed in said act; and also to convene a meeting of the board of directors, or if that should be impracticable, to convene a meeting of the executive committee of said board to take into consideration the said act and the objections thereto, to the end that the rates theretofore charged by said company, should be maintained notwithstanding said act; that the president of said company declined to entertain the said application and request of your orators and made an order directed to the officers of said company, requiring them to reduce the rates of charge upon its said road to those fixed by the act above entitled; that your orators' said bill was not exhibited by collusion with said company or its officers or directors for the purpose of giving jurisdiction to this court of the matters and things set forth and alleged therein; that it had been impracticable for your orators to solicit

or secure the co-operation of other stockholders of the said company in the aforesaid application to the president thereof,
61 or in exhibiting the said bill. In and by the said bill, your orators prayed that the said company, its officers, agents, servants and employees be by the order and injunction of your honors, enjoined from making or publishing or posting a schedule of rates to be charged by it for the transportation of freight on or over the road above mentioned, according to the terms, provisions and commands of the above-entitled act, and from reducing its charges for such service, from the rates then charged by it to those prescribed by the said act, and from obeying, observing or conforming to the commands, provisions, injunction and prohibitions of said act or any thereof, and that the said board of transportation and the members and secretaries thereof, be enjoined from entertaining or determining any complaint against said company for or on account of any act or thing by its officers, agents, servants or employees done, suffered or omitted, which may be commanded or forbidden by said act; and from instituting or prosecuting or causing to be instituted or prosecuted, any action or proceeding, civil or criminal against said company for any act or thing by it or its officers, agents, servants or employees done or omitted which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight from those prescribed by said act; and that the attorney general of said State be in like manner enjoined from bringing or aiding in bringing or causing or advising to be brought any proceeding by way of injunction or mandatory or other process or civil action or indictment against said company for or on account of the non-observance by it of the provisions of said act; and that if any county attorney or other person should bring or threaten to bring any action or proceedings, then and in that case his name should be inserted in your orator's said bill as a defendant, and he
62 be in like manner enjoined from instituting, prosecuting or advising any such actions or proceedings; and that it be by the decree of your honors declared that the said act is repugnant to the provisions of the Constitution of the United States and that of said State and that it be decreed that the injunction thereinbefore prayed, be perpetual; and also for process of injunction and subpœna directed to the defendants in the said bill.

II.

On the 3rd of August aforesaid, your honors made and issued the order of said court enjoining and restraining the said railway company, its directors, officers, agents and counselors from making, publishing or posting a schedule of rates to be charged by them for the transportation of freight on and over its railroad in this State, according to the terms, provisions and commands of the act hereinbefore entitled, and from reducing their charge for such services from the rates charged by them on the 31st of July in said year to those prescribed by the act aforesaid or any thereof; that the individual defendants named in said bill, be also enjoined and restrained

from entertaining, hearing or determining any complaint against the said company for or on account of any act or thing by it or its officers, agents, servants or employees, done or omitted, which were forbidden or commanded by said act and particularly from reducing the rates of charge for the transportation of freight by them on the 31st of July then last past to those prescribed by said act; and that the said attorney general be in like manner enjoined from bringing or aiding in bringing or causing or advising to be brought, any proceeding by way of injunction, mandatory or otherwise, or other process or civil action or indictment against said company, for or on account of any act or omission on their part committed or forbidden by said act; that the county attorneys of this
63 State and all others be restrained and enjoined from instituting or prosecuting or causing to be instituted or prosecuted any such action or proceeding or any of them, and that the plaintiffs have leave to insert the names of any such persons threatening to take such proceedings and take out further order directed to him, enjoining him as aforesaid; and that said order should remain in force until a formal motion for injunction to set aside said order, be heard and decided and that the said plaintiffs give a bond in the usual form, in the penal sum of $10,000.

III.

And your orators further show unto your honors that your orators gave said bond which, with their sureties thereon was approved by the clerk; that the defendants in the said bill and each and every of them, *was* duly served with the order above mentioned and recited, and with process of subpœna and appeared to the said bill and put in their answer thereto; and therein insisted that the said bill was in effect against the State of Nebraska, by reason whereof your honors had not jurisdiction to hear and determine the said bill; that they admitted that your orators were stockholders of the said railway company, but insisted that the said bill was collusively brought for the purpose of vesting jurisdiction in this honorable court; that in their said answer, the said individual defendants set forth in detail the proceedings whereby the said railway company became incorporated as in the said bill alleged; and insisted that the said act entitled in the said bill was constitutionally enacted and should be duly enforced and that the rates of charges for the transportation of freight fixed by the said act, yielded to the said company full, fair and adequate compensation for such service, and did not in anywise, violate any of the provisions of the Constitution of the United States or that of this State, and that the
64 enforcement thereof, would not operate a confiscation of the property of said company; and also set forth divers facts and circumstances in support of the said averments. And your orators further show that they duly filed their replication to the said answer.

IV.

At or about the time when your orators exhibited their said bill in this honorable court, three several bills were filed therein by the stockholders of the Chicago, Burlington & Quincy Railroad Company, the Chicago & Northwestern Railway Company, and the Union Pacific Railroad Company, respectively, in which substantially the same facts were alleged as were stated by your orators in their original bill first above referred to; and in and by the said bills, relief was prayed substantially the same as that prayed by your orators in their said bill. The defendants in the said three several bills, were the said companies respectively, and the members and secretaries of the board of transportation. Said defendants answered the said three several bills by alleging substantially the same facts as were alleged by them in answer to that of your orators. And the defendants in all of said four bills appeared and were represented by the same counsel. Voluminous proofs were taken upon the said three several bills, and the same came on to be heard before your honors in this honorable court, whereupon decrees were rendered according to the prayer thereof; which decrees have been substantially affirmed by the Supreme Court of the United States. In consequence of the great expense of taking the said proofs upon the said bill of your orators, it was agreed and understood, that the proofs upon the three several bills above mentioned, should be taken and accepted as proofs upon the said bill of your orator-, with the same force and effect as if taken thereon. And that your
65 orators' said bill should not be further particularly proceeded upon until the decree of the Supreme Court upon the three other bills already mentioned, should be rendered; and that whatever decree should finally be rendered by the Supreme Court upon the three bills removed thereto upon appeal, should be entered in this honorable court upon that of your orators. Pending the prosecution of the three several bills in this honorable court and the appeals from the decrees thereof, in pursuance of the aforementioned agreement, no testimony was taken upon the said bill of your orators.

V.

Pending the three several appeals, Constantine J. Smyth who was mediately the successor of George H. Hastings, as attorney general of the State of Nebraska, by proper order was substituted as a defendant and appellant in place of the said Hastings.

VI.

On the — day of —— 1900, the said Smyth as attorney general brought an action in the supreme court of the State of Nebraska in the name of said State against the said Chicago, Rock Island & Pacific Railway Company and in the petition filed therein, alleged that said company in violation of the act first above entitled, at divers times had charged for the transportation of freight between points on its road in this State, rates in excess of those fixed by the

said act and claimed judgment against the said company for $310.000 besides interest and costs. His attention being called to the injunction order hereinbefore set forth issued upon the said bill of your orators, he gave the counsel of the said company to understand that before the expiration of his term of office, he would dismiss the said action giving some insufficient reason for not presently doing so. Relying upon the said understanding and agreement, your orators took no proceedings to enforce the said injunction
66 against him, in respect of the said action and except taking from him a stipulation extending the time of the said company for pleading therein, no proceedings were taken until his term of office had expired.

At about the day last aforesaid, the said Smyth as attorney general brought another action in the district court of this State in and for Thayer county in the name of the State against the said railway company, and in the petition filed therein, alleged that said company, in violation of the act first above entitled at divers times had charged for the transportation of freight between other points in said State, than those mentioned in the petition in the action last above mentioned, and claimed judgment against said company for penalties prescribed in said act amounting to $150,000 besides interest and costs which action in said district court, remains pending therein undetermined.

On or about the first of January last past, the said defendant Frank N. Prout succeeded the said Smyth in the said office of attorney general, whereupon the said company stated to the said Prout the understanding between its counsel and the said Smyth above stated, but that officer declined to dismiss the said action. That on the — day of —— the said company filed its answer in the said action in due form alleging the said injunction issued out of this court hereinbefore set forth, to which no reply was ever filed. And thereupon, on or about the 15th day of February the said company moved the said court for judgment upon the pleadings, which motion the said court denied upon grounds which will appear in its opinion delivered thereon. No further proceedings have been had in said action. The said injunction hereinbefore stated has never been vacated, modified or discharged and is now in full force and effect. If the actions above mentioned be maintained and prosecuted, the said
67 company will be exposed to numerous like actions and be subject to the expenses and vexations attending their defense.

Wherefore, your orators pray that the order and injunction allowed by this honorable court upon their bill, be extended to and against the said Frank N. Prout as attorney general of said State, and by the order of your honors, he be subjected to the commands, injunctions and prohibitions therein set forth; and that said attorney general be particularly enjoined and restrained from further prosecuting the two several actions brought in the name of the State of Nebraska against the said railway company, and in anywise proceeding therein; and that your orators and the other stockholders of said company, have all such other and further relief as the circumstances require and is agreeable to equity and good conscience.

And your orators further pray not only an order as aforesaid, but also the usual writ of subpœna issuing out of and under the seal of this honorable court directed to the said Frank N. Prout, attorney general, of said State, commanding him that at a day therein to be inserted, he be and appear before your honors in this honorable court, and answer the said original and this supplemental bill of your orators, and stand to, perform and abide such order and decree as to your honors shall seem meet and equitable.

And your orators will ever pray, etc.

J. M. WOOLWORTH,
Solicitor for Plaintiff.

W. D. McHUGH, *Of Counsel.*

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth being duly sworn, says he is the solicitor for the plaintiffs in the foregoing bill; that he has read the said bill and knows the contents thereof, and that the matters therein stated are within his personal knowledge and that the same is true.

J. M. WOOLWORTH.

68 Subscribed in my presence and sworn to before me, this 5th day of April, 1901.

FANNIE M. PRATT,
[SEAL.] *Notary Public, Douglas County, Nebraska.*

Endorsed: Filed Apr. 6 1901 Geo. H. Thummel, clerk.

69 Thereupon afterwards, to wit: on the 23rd day of April, 1901, "demurrer of defendant F. N. Prout, to the supplemental bill of complaint of the above-named plaintiffs" was filed in said case, which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States within and for the District of Nebraska.

JAMES C. STARR and SAMUEL W. ALLERTON, Complainants,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the States of Illinois, Iowa, and Nebraska, and Frank N. Prout, Attorney General of the State of Nebraska, Defendants.

The Demurrer of the Above-named Defendant, F. N. Prout, to the Supplemental Bill of Complaint of the Above-named Plaintiffs.

This defendant by protestation, not confessing or acknowledging all or any of the matters in the said supplemental bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demure to the said supplemental bill and for cause of such demurrer shows:

First. That this honorable court has no jurisdiction of the action alleged in said bill of complaint, for the following reasons:

(*a.*) That this defendant is complained against in his official capacity as attorney general of the State of Nebraska, and not in his individual capacity as a citizen thereof.

(*b.*) That the real party in interest defendant is not this demurring defendant, but the sovereign State of Nebraska whose officer
70 he is and as whose agent he is acting, all of which appears by the said complainant's supplemental bill of complaint herein filed.

(*c.*) That this supplemental action is in contravention of the eleventh amendment of the Constitution of the United States, which provides: "The judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

Second. That it appeareth by the plaintiffs' own showing by said supplemental bill that they are not entitled to the relief prayed by said bill against this defendant.

Wherefore and for divers other good causes of demurrer appearing in said bill, this defendant does demur thereto. And he prays the judgment of this court whether he shall be compelled to make any answer to said bill and he humbly prays to be thence dismissed with his reasonable costs in this behalf sustained.

FRANK N. PROUT,
Attorney General, Solicitor and Counsel for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Dated April 23, 1901.

F. N. PROUT,
Solicitor for the Defendant Who Has Demurrer.

Endorsed: Filed —— 23, 1901. Geo. H. Thummel, clerk.

STATE OF NEBRASKA, *ss:*

Frank N. Prout, being first duly sworn according to law,
71 deposes and says: that I am the defendant who files demurrer in this suit, and that the foregoing demurrer is not interposed for the purpose of delay.

FRANK N. PROUT.

Subscribed in my presence and sworn to before me, this 23d day of April, A. D., 1901.

[SEAL.] GEO. H. THUMMEL, *Clerk.*

72 Thereupon afterwards, to wit: at the November term of said court, and on the 23rd day of April, 1901, the following proceedings were had and done in said case, as appear on the journal of proceedings of said court had on said day, to wit:

JAMES C. STARR ET AL.
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. ET AL.

This cause coming on to be heard on the demurrer to the supplemental bill, the same is fully argued by the attorneys for the respective parties and submitted to the court.

73 Thereupon afterwards, to wit: on the 25th day of April, A. D. 1901, a memoranda opinion of Judges W. H. Sanborn and W. H. Munger on a demurrer to supplemental bill and motion for temporary injunction was filed in said case, which said memo. opinion is in words and figures following, to wit:

United States Circuit Court, District of Nebraska.

JAMES C. STARR ET AL., Complainants,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Company, Frank N. Prout, *et al.*, Defendants.
} Demurrer to Supplemental Bill and Motion for Temporary Injunction.

Messrs. Woolworth & McHugh, for complainants.
Mr. Frank N. Prout, *per se.*

Before Sanborn, circuit judge, and Munger, district judge.

SANBORN, circuit judge, delivered the opinion of the court:

This is a demurrer to a supplemental bill of the complainants which discloses these facts: In 1893 the legislature of the State of Nebraska passed an act commonly called the maximum freight rate law, which named certain rates of transportation, required the railway companies operating in that State to reduce their rates *to* those there prescribed, and provided that they should become liable to severe penalties for any failure to comply with its provisions. Comp. Stats. of Nebraska, 1893, chap. 72, art. 12. The complainants were stockholders of the Chicago, Rock Island & Pacific Railway Company, and on August 3, 1893, they exhibited to this court their bill in equity against the railway company, George H. Hastings, who was then the attorney general of the State of Nebraska, and numerous other
74 parties, officers of the State, upon whom the discharge of some duty devolved under the act of the legislature to which we have adverted. They alleged in this bill that the rates prescribed by this act were confiscatory and that the law was unconstitutional and prayed for a temporary and a perpetual injunction against the defendants forbidding them from taking any action to put in operation or to enforce any of the provisions of the law. On August 3, 1893, this court issued a temporary injunction upon a bond for $10,000, which forbade the railway company from putting in operation the rates prescribed by the law and from complying with its provisions, prohibited George H. Hastings, the attorney

general, from bringing or aiding in bringing or causing or advising to be brought any proceeding by way of injunction or mandatory or other process or civil action or indictment against said company, for or on account of any act or omission commanded or forbidden by the act and restrained the members of the board of transportation of the State from taking any action under the law until the further order of this court. At about the same time that this suit was commenced, the stockholders of the Chicago, Burlington and Quincy Railroad Company, of the Chicago and Northwestern Railway Company, and of the Union Pacific Railway Company brought suits of the same nature against those companies respectively and against George H. Hastings the attorney general and against the other officers of the State and prayed for the same relief. The issues in the four suits were the same and they were prosecuted and defended by the same counsel. Voluminous proofs were taken in the three suits against the other companies and it was agreed that the proofs taken in those suits should have the same force and effect in this suit as if taken herein and that the same decree should be eventually rendered in this suit that should be finally affirmed or rendered by the Supreme Court in those suits.

75 Constantine J. Smyth succeeded George H. Hastings as attorney general of Nebraska and was substituted for him in the three suits.

These three cases finally resulted in decrees to the effect that the maximum freight rate law was unconstitutional, that the railway companies, the board of transportation, its members and secretaries were forbidden from putting in force the rates it prescribed or from complying with its provisions "and that the attorney general of this State be in like manner enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said companies, or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by said act." Smyth *vs.* Ames, 169, U. S. 466, 477, 550 Smyth was not substituted for Hastings in this suit. In ignorance of the injunction herein he brought an action in the name of the State of Nebraska in the year 1900, in the supreme court of the State of Nebraska, against the Chicago, Rock Island & Pacific Railway Company for $310,000, and another in one of the district courts of the State for $150,000, penalties prescribed by the freight rate law for the failure of the company to disobey the injunction of this court and to reduce its rates of transportation to the rates prescribed by that act. About January 1, 1901, the defendant, Frank N. Prout, succeeded Smyth as attorney general of the State. To the action in the supreme court of Nebraska the railway company answered the proceedings in this suit in this court and made a motion for judgment on the pleadings, which was denied by the supreme court of the State on the ground that this court, on account of the eleventh amendment to the Constitution, had no jurisdiction to enjoin the attorney general or any other officer of the State from enforcing the provisions of this

76 unconstitutional law. State *vs.* Chicago, Rock Island & Pacific Railway Co. — Rep. —.

The prayer of the supplemental bill is that the injunction in this case be extended to Frank N. Prout as attorney general of the State of Nebraska, that he be restrained from further prosecuting the two actions against the railway company, and that the complainants have general relief. The ground of the demurrer is that the relief sought by the supplemental bill *in is* contravention of the eleventh amendment of the Constitution of the United States which provided: "The judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

The contention of Mr. Prout is that this court has no jurisdiction to enjoin him from enforcing the maximum freight law because he is acting not for himself, but for and in the name of the State, and that this proceedings is in reality a suit against the State.

This court is not at liberty to disregard the decisions of the Supreme Court of the United States. Its duty is completely performed when it protects the rights and administers the remedies of litigants in strict accord with the rules of law established by those decisions. In the case before us the opinions of that court and the decrees which it has rendered or affirmed have conclusively settled every question which has been presented and have left nothing open for our discussion or decision. We shall, accordingly, content ourselves with a brief statement of the principles which determine and the authorities which compel our action.

1. The Federal courts must determine for themselves the limits of their jurisdiction, and the Supreme Court of the United
77 States is the final arbiter in all questions of this nature. A renunciation of this power or a failure to discharge this duty would be fatal to our system of government. It would withdraw the keystone of the arch. United States *vs.* Peters, 5 Cranch. 115; Freeman *v.* Howe, 24 Howard, 450, 459, 460.

2. Wherever a Federal court and a State court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. This rule applies equally to civil and criminal proceedings. Harkrader *v.* Wadley, 172 U. S. 148, 164; Sharon *v.* Terry, 36 Fed. 337; Wallace *v.* McConnell, 13 Peters, 135; Five Hundred and Five Thousand Feet of Lumber, 65 Fed. 236; 12 C. C. A. 628, 24 U. S. App. 509; Gates *v.* Buckeye, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961; Chittenden *v.* Brewster, 2 Wall. 191; Orton *v.* Smith, 18 How. 263, 265; Union Trust Co. *v.* Rockford, Rock Island & St. Louis R. Co., 6 Biss. 197, 24 Fed. Cases, 704; Owens *v.* R. R. Co., 20 Fed. 10; Union Mutual Life Ins. Co. *v.* University of Chicago, 6 Fed. 443; Freeman *v.* Howe, 24 How. 450; Peck *v.* Jenness, 7 How. 612, 622, 625; Taylor *v.* Carryl, 20 How. 583, 596, 597; Wiswall *v.* Sampson, 14 How. 52; Covell *v.* Heyman, 111 U. S. 176; Heidritter *v.* Oil Cloth Co. 112 U. S. 294, 302; Riggs *v.* Johnson Co., 6 Wall. 166, 196; Central Trust Co. of New York *v.* South Atlantic & O. R. Co. 57 Fed. 3.

3. The foregoing principle is so indispensable to the harmonious working of our systems of Federal and State jurisprudence that neither the eleventh amendment to the Constitution nor section 720 of the Revised Statutes, which prohibits the issue by a court of the United States of a writ of injunction to stay proceedings in any court of a State, can be permitted to interfere with its
78 maintenance. The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues and its administration of the rights and remedies involved in the litigation. French, trustee *v.* Hay, 22 Wall. 250; Dietzsch *v.* Huidekoper, 103 U. S. 494; Moran *v.* Sturges, 154 U. S. 256; Fisk, executrix, *v.* Union Pacific R. R. Co., 10 Blatch. 518; Garner *v.* Second National Bank, 33 U. S. App. 91; Terre Haute & I. R. Co. *v.* Peoria & P. U. R. Co. 92 Fed. 945.

4. In suits to enjoin officers of a State from inflicting threatened injury upon property rights two classes of cases arise, (1) those in which the suits are held to be in reality against the State, and of which the Federal courts may not take jurisdiction on account of the eleventh amendment to the Constitution, and (2) those in which the threatened acts may not be justified under the authority of a State, of which the national courts have jurisdiction and to which the prohibition of the eleventh amendment has no application. In Pennoyer *v.* McConnaughty, 140 U. S. 1, 10, the Supreme Court thus distinguished these classes:

"The first class is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re* Ayers, 123 U. S. 443; Louisiana *v.* Jumel, 107 U. S. 711; Antoni *v.* Greenhow, 107 U. S. 769; Cunningham *v.* Macon & Brunswick Railroad, 109 U. S. 446; Hagood *v.* Southern, 117 U. S. 52.

"The other class is where a suit is brought against defend-
79 ants who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights of property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the eleventh amendment, an action against the State. Osborn *v.* Bank of the United States, 9 Wheat. 738; Davis *v.* Gray, 16 Wall. 203; Tomlinson *v.* Branch, 15 Wall. 460; Litchfield *v.* Webster County, 101 U. S. 773; Allen *v.* Baltimore & Ohio Railroad, 114 U. S. 311; Board of Liquidation *v.* McComb, 92 U. S. 531; Poindexter *v.* Greenhow, 114 U. S. 270."

This classification has since been repeatedly approved. *In re* Tyler, petitioner, 149 U. S. 164, 196; Scott *v.* Donald, 165 U. S. 656, 768; Tindall *v.* Wesley, 167 U. S. 204, 220.

5. This case falls in the second class. It is a suit to enjoin individuals, acting as officers of the State, from enforcing an unconstitutional enactment to the injury of the rights of the complainants. It is not governed by the eleventh amendment to the Constitution and this court has complete jurisdiction of its subject-matter and of the parties to the litigation. Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 369, 371, 373, 390. Smyth *v.* Ames, 169 U. S. 515, 517, 518. The opinion in Smyth *v.* Ames concludes all discussion of this question. We are all bound to abide by that decision because it is the supreme law of the land. That case presented the same unconstitutional law, the same pleadings, the same issues of fact and
80 the identical question of law upon the determination of which this suit hinges. The Supreme Court of the United States there decided that this court had jurisdiction to issue, and that it rightfully issued its writ against the attorney general of the State of Nebraska, enjoining him from bringing and from aiding in bringing any suits or proceedings to enforce the provisions of the maximum freight rate law of Nebraska. In view of this conclusive adjudication of the very question here in issue it would be an idle task to distinguish or review other cases wherein other questions, such as the power of a court of equity to enjoin criminal proceedings were involved as in Frits *v.* McGee, 172 U. S., 516, 531, and Harkrader *v.* Wadley, 172 U. S., 148, 169, 170, and we refrain from their consideration or discussion. It is enough that the highest court in the land, the court by whose decisions courts, counsel and citizens alike are bound to abide, has authoritatively determined the very issue involved in this case, and here we must leave it.

This suit then was commenced in 1893, this court at that time obtained jurisdiction of the subject-matter of this litigation, of the issue whether or not this law of Nebraska was constitutional and enforceable and of the parties to this suit, the railway company and those who were then acting as officers of the State. It rightfully enjoined the company from reducing its rates to those prescribed by the law, and it lawfully prohibited the attorney general of the State, and its other officers, from enforcing its provisions. That injunction has never been vacated or modified and it still remains in force; Vulcanite Co., *v.* Folsom 3 Fed. 509. The defendant, Frank N. Prout, is prosecuting actions commenced in 1900, six years after this suit was begun, to recover of the defendant railway company penal-
ties to the amount of four hundred and fifty thousand dollars
81 because it obeyed the injunction of this court and failed to reduce its charges to those specified by the unconstitutional law. In other words the effect of these later actions is to toll off to another court the question which has long been and still is properly in litigation here, to severely punish one of the parties to this suit for its obedience to an injunction lawfully issued upon a prayer of the complainants in this court and to forestall and nullify any decision and decree of this court regarding issues of which it first law-

fully took jurisdiction. The impropriety, the inadmissibility of such a proceeding in the light of the fundamental rules of our judicial systems, to which we have now adverted, is so manifest that we have no doubt that the learned attorney general, when his attention is once directed to them, will at once perceive the propriety and necessity of suspending all action in other courts involving the unconstitutionality of this law and the right and duty of this railway company to reduce its charges to those there prescribed, until this court, which first acquired jurisdiction of the issues and the parties, has finally determined the questions presented.

The court of appeals has frequently required the Federal courts of this circuit to stay their hands and to hold their suits in abeyance until the final determination by the State course of issues of which those courts first acquired jurisdiction. Gates *v.* Buckeye, 53 Fed. 961. Zimmerman *v.* Sorelle, 80 Fed. 417, 419. If the State courts had first taken jurisdiction of the issues involved in this suit we should have gladly followed the foregoing decisions, but the rule applies where the Federal court first takes jurisdiction as well as where jurisdiction is first acquired by the State court. The enforcement of this rule, that the court which first takes jurisdiction must retain and exercise it to the exclusion of all
82 proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree and by its effective execution, is indispensable to prevent unseemly conflicts between courts and their officers and "confusion worse confounded." The maintenance of this rule requires that the defendant Frank N. Prout, acting as attorney general of the State of Nebraska, shall not bring or prosecute in any other court any actions or proceedings involving the constitutionality of the maximum freight rate law of Nebraska, and the rights and duties of this railway company thereunder to reduce its rates to those there prescribed until the final determination of this suit; and that the jurisdiction and power of this court to determine those issues, to render and enforce its decrees in this case shall be left unlimited and unvexed by any such proceedings.

The Supreme Court decided in Smyth *v.* Ames that this court rightfully issued its injunction to this effect against the then attorney general of the State of Nebraska upon the same facts which the supplemental bill alleges and the demurrer admits condition- the rights and remedies of the parties to this suit.

There is no escape from the conclusion that the complainants are entitled to the same relief against the present attorney general of this State. He has no higher right or better authority to proceed against this railway company, subsequent to a decision of the Supreme Court that the law under which he is acting is unconstitutional, than his predecessor had to proceed under it before that decision. New Orleans *v.* Citizens' Bank, 167 U. S., 388, 389.

The demurrer to the supplemental bill must be overruled, writ of injunction must be issued against Frank N. Prout, temporarily restraining him from bringing or prosecuting actions, in ac-
83 cordance with the views expressed in this opinion and, if the defendants elect to stand upon this demurrer, a final decree

in the form approved by the Supreme Court in the case of Ames *v.* Smyth must be rendered herein in favor of the complainants.

Endorsed: Filed Apr. 25 1901 Geo. H. Thummel, clerk.

84 Thereupon afterwards, to wit: at the November, 1900, term of said court, and on the 29th day of April, the following order was signed and filed in said case, and entered of record on the journal of proceedings of said court, had on said day, to wit:

Present: Hon. Walter H. Sanborn, circuit judge, and Hon. William H. Munger, district judge.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated, *vs.* THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company, George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph H. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands and Buildings, Constituting the Board of Transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz, and J. W. Johnson, Secretaries of said Board.	Original Bill.
JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated, *vs.* THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company and Frank N. Prout, Attorney General of the State of Nebraska.	Supplemental Bill.

This cause came on to be heard upon the motion of the plaintiffs for the injunction prayed for in the supplemental bill and the demurrer thereto of the defendant Prout, and was argued by counsel. Upon consideration whereof, it is

Ordered, adjudged and decreed that the said demurrer be and the same hereby is overruled, and it is further

85 Ordered, adjudged and decreed that the said defendant Prout, attorney general of the State of Nebraska, be and he is hereby enjoined and restrained from bringing or causing to be brought, any action or actions in the courts of the State of Nebraska, for the recovery of penalties pretended and alleged by him to have been incurred by the said railway company, under the act of the legislature of the State of Nebraska, in the said bills entitled "An act to regulate railroads, classify freight, fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and provide penalties for the violation of this act," and that he be in like manner enjoined and

restrained from prosecuting two several actions brought in the name of said State by Constantine J. Smyth as attorney general, against the said railway company, for the recovery under said act, of penalties pretended by him to have been incurred by said company, one brought in the supreme court and the other in the district court of Thayer county of said State. And said two several injunctions shall be and remain in force until the time and upon the contingency hereinafter mentioned. It is further

Ordered, adjudged and decreed that if the said defendant Prout, attorney general elect to further defend said bills, the said injunction shall continue in force until the final hearing thereof, and decree rendered therein; if such decree be in favor of the said plaintiff, the said injunction shall thereupon, be made perpetual; but if *the* such decree be against the said plaintiff, the said injunction shall be dissolved. If, on the other hand, the said Prout shall stand by his demurrer and decline further to defend against the said bills, final decree shall be entered in favor of the plaintiffs and against the said attorney general, in terms conformable to
86 the decree of the Supreme Court of the United States in the case of Constantine J. Smyth, *et al.*, against Ames, *et al.* It is further

Ordered that a writ of injunction issue out of this court as hereinbefore ordered.

W. H. MUNGER, *Judge.*

Dated April 29th, 1901.

Endorsed: Filed Apr. 29 1901 Geo. H. Thummel, clerk.

87 Thereupon afterwards, to wit, on the 21st day of June, 1901, demurrer to supplemental bill of complaint was filed in said case, which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,
v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *et al.*

The demurrer of The Chicago, Rock Island & Pacific Railway Company, defendant, to the supplemental bill of complaint of James C. Starr and Samuel W. Allerton.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' bill to be true, in such manner and form as the same are therein set forth or alleged, do demur thereto, and for cause of demurrer show that the said plaintiffs have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery

or relief as is thereby sought or prayed for, from, or against this defendant; wherefore, this defendant demands the judgment of this honorable court, whether it shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with its reasonable costs in this behalf sustained.

R. MATHER,
Solicitor for Defendant.

Endorsed: Filed Jun- 21 1901 Geo. H. Thummel, clerk.

88 Thereupon afterwards, to wit: upon the 21st day of June 1901 "demurrer to bill of complaint" was filed in said case, which said demurrer is in words and figures following, to wit:

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Company *et al.*
} Demurrer.

The demurrer of The Chicago, Rock Island & Pacific Railway Company, defendant, to the bill of complaint of James C. Starr and Samuel W. Allerton.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' bill to be true, in such manner and form as the same are therein set forth or alleged, do demur thereto and for cause of demurrer show that the said plaintiffs have not in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from, or against this defendant; wherefore, this defendant demands the judgment of this honorable court, whether it shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with its reasonable costs in this behalf sustained.

R. MATHER,
Solicitors for Defendant.

Endorsed: Filed Jun- 21 1901 Geo. H. Thummel, clerk.

89 Thereupon afterwards, to wit: at the May 1901 term of said court, and on the 25th day of June, 1901, the following decree was signed and filed in said case, and entered of record on the journal of proceedings of said court, had on said day, to wit:

Present: Hon. William H. Munger, district judge.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company, George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph B. Bartley, State Treasurer, and A. B. Humphrey, Commissioner of Public Lands and Buildings, Constituting the Board of Transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz, and J. W. Johnson, Secretaries of said Board. } Original Bill.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company and Frank N. Prout, Attorney General of the State of Nebraska. } Supplemental Bill.

This cause came on to be heard upon the bills above entitled, the demurrers thereto of the defendant The Chicago, Rock Island & Pacific Railway Company, and the demurrer of the defendant Prout as attorney general to the supplemental bill and the order of this court bearing date the 29th day of April, 1901.

90 And thereupon, the said defendant Prout, attorney general of the State of Nebraska, announced to the court that he should stand on his demurrer to the said supplemental bill and decline further to defend against the said bills. After hearing counsel for the respective parties, it is

Ordered, adjudged and decreed as follows: That the said demurrers of the said defendant, The Chicago, Rock Island & Pacific Railway Company be and they are hereby overruled and the said company is perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by it for the transportation of freight on and over its roads in this State from one point to another therein, whereby such rate shall be reduced to those prescribed by the act of the legislature of this State, called in the bill filed herein "House roll 33," and entitled "An act to regulate railroads, to classify freights to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads of the State of Nebraska, and to provide penalties for the violation of this act," approved April 12, 1893, or in anywise obeying, observing or conforming to the provisions, commands, injunctions and prohibitions of said alleged act; and that the attorney general of this State be in like manner enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said com-

pany for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof, directed to the said defendants, commanding, enjoining and restraining them as hereinbefore set forth which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said
91 act the said defendant railroad company may not exact for the transportation of freight from one point to another within this State, charges which yield to the said company, reasonable compensation for such services, it is further

Ordered, adjudged and decreed by the court that inasmuch as the board of transportation of Nebraska which was acting as such board at and before the passage and approval of the act aforesaid, and which was acting as such board at the time of the beginning of this suit, was acting under and by virtue of a certain act of the legislature of the State of Nebraska passed in the year 1887, and inasmuch as, since the beginning of this suit, the act of the year 1887 aforesaid under which the said board of transportation was acting as aforesaid was, in the year 1900, by the supreme court of the State of Nebraska, declared inconstitutional; and inasmuch as all prior acts which created a board of transportation have been, since the beginning of this suit and in the year 1901, repealed by the legislature of the State of Nebraska; and inasmuch as by reason of said decision declaring said law of 1887 unconstitutional and the repeal of said prior acts, there is at present no board of transportation of the State of Nebraska, no perpetual injunction should issue herein against any such board and no decree of injunction should be entered herein against any board of transportation of the State of Nebraska. It is further

Ordered, adjudged and decreed that the defendant, the attorney general of the State, may hereafter when the circumstances have changed so that the rates fixed in the said act shall yield to the said company reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as he may be advised, for a further order in this behalf. It is further

Ordered, adjudged and decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk.

92 Thereupon, the defendant Prout as attorney general, excepted to the above decree and each and every part thereof, and prayed an appeal therefrom to the Supreme Court of the United States, which is hereby allowed.

Dated this 25th day of June, 1901.

W. H. MUNGER, *Judge.*

Endorsed: Filed Jun- 25 1901 Geo. H. Thummel, clerk.

93 Thereupon afterwards, to wit: on the 12th day of July, 1901, "petition on appeal" was filed in said case, which said petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company, George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph S. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands and Buildings, Constituting the Board of Transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz, and J. W. Johnson, Secretaries of said Board. } Original Bill.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company and Frank N. Prout, Attorney General of the State of Nebraska. } Supplemental Bill.

Petition on Appeal.

To the Hon. William H. Munger, district judge and one of the judges of the above-named court, presiding therein:

The above-named defendant Frank N. Prout, attorney general of the State of Nebraska, in the above-entitled supplemental bill, conceiving himself aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause,
94 under date of June 25, 1901, whereof and whereby among other things it was and is ordered and directed that the demurrer of the said Frank N. Prout, to the supplemental bill of complaint of the plaintiff be overruled, and that the said Frank N. Prout, as attorney general be enjoined from bringing, aiding in bringing, or cause to be brought any proceedings by way of injunction, mandamus, civil action, or indictment against the Chicago, Rock Island & Pacific Railway Company for, or on account of any action or omission on their part commanded or forbidden by an act of the legislature of the State of Nebraska entitled "An act to regulate railroads, classify freights, fix reasonable maximum rates, to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act," and adjudging and decreeing that the act above entitled is repugnant to the Constitution of the United States, does hereby appeal to the Supreme Court of the United States from said order and decree and particularly from that part thereof which

overrules the demurrer of the said Frank N. Prout to said supplemental bill, and declares said act of the legislature of the State of Nebraska to be repugnant to the Constitution of the United States, for the reasons set forth in the assignment of errors which is filed herewith.

And he prays that this his petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 11 day of June, 1901.

F. N. PROUT,
Attorney General, Pro Se.

95 The foregoing petition on appeal is granted and the claim of appeal therein made is allowed. Done in open court this 12th day of July, 1901. Cost bond fixed at $500.00 to be approved by the clerk.

W. H. MUNGER,
District Judge and One of the Judges of said United States Court, Presiding Therein.

Endorsed: Filed Jul- 12 1901 Geo. H. Thummel, clerk.

96 Thereupon afterwards, to wit: on the said 12th day of July, 1901, "assignment of error" was filed in said case, which said assignment is in words and figures following, to wit:

Assignment of Error.

In the Circuit Court of the United States for the District of Nebraska.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph S. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands and Buildings, Constituting the Board of Transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz, and J. W. Johnson, Secretaries of said Board.

JAMES C. STARR and SAMUEL W. ALLERTON, Suing on Their Own Behalf and on Behalf of All Others Similarly Situated,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and Frank N. Prout, Attorney General of the State of Nebraska.

Comes now Frank N. Prout, attorney general of the State of Nebraska, and says there is manifest error in the record of the proceedings and decree in the above-entitled cause, in this, to wit:

1. That the said court erred in its said judgment and decree in that part thereof wherein it is ordered, adjudged and decreed that the demurrer of the said Frank N. Prout, attorney general of the State of Nebraska, be overruled.

97 2. That said court erred in its said judgment and decree in that part thereof wherein it adjudged and decreed that the said Frank N. Prout, attorney general of the State of Nebraska, be perpetually enjoined and restrained from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against the said Chicago, Rock Island & Pacific Railway Company for, or on account of any action or omission on their part commanded or forbidden by an act of the legislature of the State of Nebraska entitled "An act to regulate railroads, to classify freight, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads of the State of Nebraska, and to provide penalties for the violation of this act," approved April 12, 1893.

F. N. PROUT,
Attorney General of the State of Nebraska.

Endorsed: Filed Jul- 12 1901 Geo. H. Thummel, clerk.

98 Thereupon afterwards, to wit: on the 16th day of July 1901, a "bond" on appeal was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents: That we, Frank N. Prout attorney general, of the State of Nebraska, as principal, and The American Bonding and Trust Company of Baltimore City, as sureties, are held and firmly bound unto James C. Starr, Samuel W. Allerton and the Chicago, Rock Island & Pacific Railway Company, in the full and just sum of $500.00 to be paid to the said James C. Starr, Samuel W. Allerton and the Chicago, Rock Island & Pacific Railway Company, their heirs, executors, administrators and assigns; to the payment of which sum well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 12th day of July A. D., 1901.

Whereas, lately at the May term A. D., 1901 of the circuit court of the United States for the district of Nebraska, in a suit pending in said court between James C. Starr and Samuel W. Allerton, *versus* The Chicago, Rock Island & Pacific Railway Company and Frank N. Prout, attorney general of the State of Nebraska, decree was rendered against said Frank N. Prout, att'y gen'l of the State of Nebraska and an allowance obtained of an appeal from the said court to reverse the said decree in the aforesaid suit and a citation directed to said appellees citing and admonishing them to be and appear in the United States Supreme Court at the city of Washington, D. C., thirty days from the time said citation bears date:

Now, the condition of the above obligation is such that if the

said Frank N. Prout, attorney general of the State of Ne-
99 braska shall prosecute said appeal to effect and answer all costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

F. N. PROUT, *Attorney General.*

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,

[SEAL.] By J. B. STRODE, *Vice-Pres't.*

Attest: O. W. PALM, *Ass't Sec'y.*

Bond & sureties approved July 16th, 1901.

W. H. MUNGER, *Judge.*

Endorsed: Filed Jul- 16 1901 Geo. H. Thummel, clerk.

100 Thereupon afterwards, to wit: on the 20th day of July, 1901, "precipe for transcript" was filed in said case, which said precipe is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

SAMUEL W. ALLERTON ET AL.
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILway Company *et al.*
} Præcipe for Transcript.

To the clerk of said court:

Please have transcript prepared in the above-entitled case, and include the following pleadings and proceedings of record:

Bill.
Restraining order.
Answer.
Replication.
Supplemental bill.
Demurrer.
Order, demurrer argued and submitted.
Memo. opinion.
Order overruling demurrer.
Demurrer to sup. bill.
Demurrer to bill.
Decree.
Petition on appeal.
Assignment of error.
Bond.
Præcipe.
Citation.

F. N. PROUT,
Attorney General.

Endorsed: Filed Jul- 20 1901 Geo. H. Thummel, clerk.

101 Thereupon afterwards, to wit: on the 12th day of July, 1901, a citation was duly signed in said case, and returned and filed with acceptance of service endorsed thereon, July 22nd, 1901, the following of which is the original:

102 *Citation.*

James C. Starr, Samuel W. Allerton, and The Chicago, Rock Island & Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the city of Washington, D. C., thirty days from and after this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Frank N. Prout, attorney general of the State of Nebraska, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of July in the year of our Lord nineteen hundred and one.

W. H. MUNGER,
United States District Judge for the District of Nebraska.

Due and legal service of the above citation is hereby accepted at Omaha, Nebraska, July 12th, 1901.

J. M. WOOLWORTH &
W. D. McHUGH,
Solicitors for Appellees Starr and Allerton.
R. MATHER,
Sol. for C., R. I. & P. R. Co.,
By J. M. W.

102½ [Endorsed:] 64 q In the circuit court of the United States, for the district of Nebraska. James C. Starr and Samuel W. Allerton, appellees, *vs.* C. R. I. & Pac. R'y Co., appellees, and Frank N. Prout, appellant. Citation. Filed Jul- 22 1901 A. D. Geo. H. Thummel, clerk. Frank N. Prout, attorney general.

103 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

I, Geo. H. Thummel, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that in compliance with the præcipe, a copy of which is found on page — of this record, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said court as mentioned in said præcipe and as indicated in the foregoing index, in the case of James C. Starr & Samuel W. Allerton, *vs.* The Chicago, Rock Island & Pacific Railway Company,

et al., No. 64 docket "Q;" and that a duly certified copy of the citation has been lodged and remains in my said office as such clerk.

Witness my hand and seal of said circuit court at Omaha, in said district this 29th day of July A. D., 1901.

[Seal United States Circuit Court, District of Nebraska.]

GEORGE H. THUMMEL, *Clerk.*

Endorsed on cover: File No. 18244. Nebraska C. C. U. S. Term No. 391. Frank N. Prout, attorney general of the State of Nebraska, appellant, *vs.* James C. Starr, Samuel W. Allerton and The Chicago, Rock Island & Pacific Railway Company. Filed August 9, 1901.

No. 150

MAR 31 1902
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Brief of Prout for Appellant

No. 391.

Filed Mar. 31, 1902.

FRANK N. PROUT, ATTORNEY GENERAL OF THE STATE OF NEBRASKA,

Appellant,

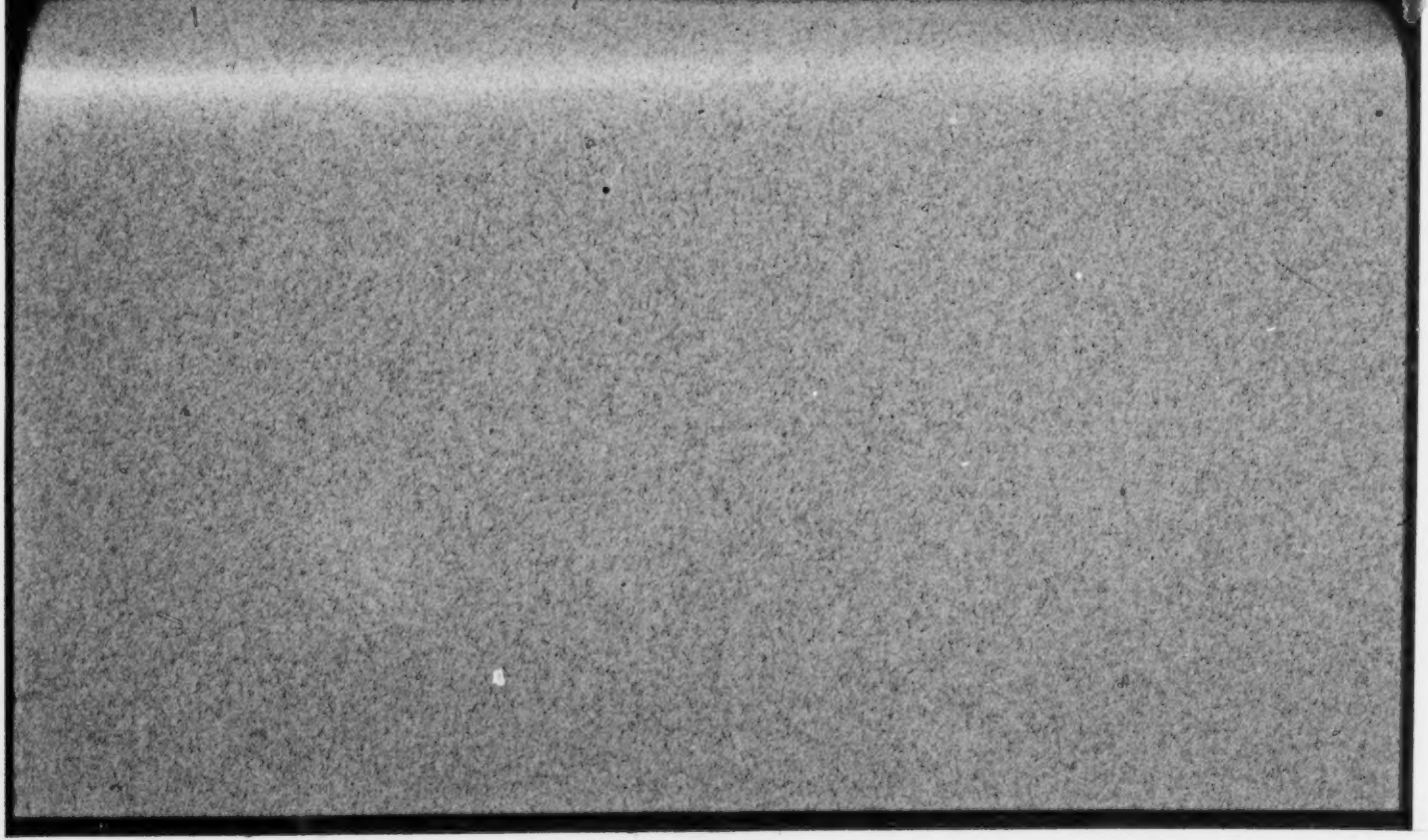
v.

JAMES C. STARR, SAMUEL W. ALLERTON, AND THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA. HEARD BELOW BEFORE SANBORN, CIRCUIT JUDGE, AND MUNGER, DISTRICT JUDGE.

BRIEF OF APPELLANT.

F. N. PROUT, *Attorney General, pro se.*



In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 391.

FRANK N. PROUT, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, *Appellant*,

v.

JAMES C. STARR, SAMUEL W. ALLERTON, AND THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA. HEARD BELOW BEFORE SANBORN, CIRCUIT JUDGE, AND MUNGER, DISTRICT JUDGE.

F. N. PROUT, *Attorney General, pro se.*

BRIEF OF APPELLANT.

I.

Statement of the Case.

The court below, by the decree of which complaint is here made, perpetually enjoined the present attorney general of Nebraska from prosecuting in the supreme court of the state of Nebraska a suit instituted by the state March 10, 1900, to recover from the Chicago, Rock Island and Pacific Railway Company $310,000 as penalties for violations of the maximum freight law of Nebraska. This law went into effect June 8, 1893. It fixed maximum rates for transportation of freight upon the rail-

roads in Nebraska, required the carriers to reduce their charges to limits prescribed by the statute, and imposed penalties for violations of its provisions. (Compiled Statutes of Nebraska, ch. 72, art. 12.)

August 3, 1893, Samuel W. Allerton and James C. Starr, non-resident stockholders of the Chicago, Rock Island and Pacific Railway Company, filed in the circuit court of the United States for the district of Nebraska a bill of complaint upon which the United States circuit court made a temporary order restraining the said railway company from reducing its rates to those prescribed by the maximum freight law, on the ground that the statute is void, and, if enforced, would deprive the carrier of its right under the federal constitution to charge compensatory rates. By the same order the United States circuit court also restrained the Nebraska state board of transportation and the attorney general from taking any action to enforce the maximum freight law. In this suit in the circuit court the issues were joined October 3, 1893, but no further action was taken until April 6, 1901.

Without regard to the restraining order of the United States circuit court Constantine J. Smyth, as attorney general, brought suit in the supreme court of Nebraska March 10, 1900, on behalf of the state of Nebraska to recover from the Chicago, Rock Island and Pacific Railway Company $310,000, as penalties for violations of the maximum freight law. This suit for penalties was pending when the present attorney general went into office January 3, 1901. February 15, 1901, defendant filed in the state supreme court a motion to dismiss the suit for penalties on the ground that prosecution thereof was forbidden by the United States circuit court. The motion was overruled. (Printed Record p. 44; *State v. Chicago, R. I. & P. R. Co.*, 85 N. W., 556.) April 6, 1901, Samuel W. Allerton and James C. Starr filed a supplemental bill of complaint in their former suit in said circuit court,

praying that the original order entered therein in said cause be extended to the present attorney general, and that he be particularly enjoined and restrained from further prosecuting the said suit for penalties. To the supplemental bill of complaint the attorney general filed a demurrer, assigning the following grounds therefor:

"1. That this honorable court has no jurisdiction of the action alleged in said bill of complaint, for the following reasons:

"(*a*) That this defendant is complained against in his official capacity as attorney general of the state of Nebraska, and not in his individual capacity as a citizen thereof.

"(*b*) That the real party in interest defendant is not this demurring defendant, but the sovereign state of Nebraska, whose officer he is and as whose agent he is acting, all of which appears by the said complainants' supplemental bill of complaint herein filed.

"(*c*) That this supplemental action is in contravention of the eleventh amendment to the constitution of the United States, which provides: 'The judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'

"2. That it appeareth by the plaintiffs' own showing by said supplemental bill that they are not entitled to the relief prayed by said bill against this defendant."

The demurrer was overruled. (Printed Record p. 53.) The attorney general elected to stand upon his demurrer, and a decree was entered perpetually enjoining him from prosecuting the suit for penalties. (Printed Record p. 56.) It is of this decree appellant complains.

II.

Argument.

A suit to enjoin the attorney general of the state of Nebraska from prosecuting an action in the name of the state of Nebraska to recover from a railroad company penalties for violations of the maximum freight law is a suit against the state within the meaning of the eleventh amendment to the federal constitution, which provides that the judicial power of the United States shall not extend to suits against a state, and such a suit is therefore not within the jurisdiction of the federal courts.

The question presented by the record is: Has the circuit court of the United States jurisdiction to enjoin the attorney general of the state of Nebraska from prosecuting in the supreme court of the state of Nebraska a suit instituted by the state to recover from a common carrier operating within the state penalties for violations of a statute enacted by the legislature of the state? It is insisted that in passing upon this question the validity of the statute should not be considered. If the maximum freight law of Nebraska violates any provision of the federal constitution it will be declared void by the supreme court of Nebraska when that question is presented in the case of the State of Nebraska against the Chicago, Rock Island & Pacific Railway Company; but if the state court should hold that the statute does not conflict with the organic law of the nation, complainants may have the judgment reviewed upon writ of error in this court. The duty of state courts to uphold the fundamental law of the United States is no less imperative than that of the federal courts. In *Fitts v. McGhee*, 172 U. S., 532, it was said by this court:

"The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect to tolls. Let them appear to the indictment and defend themselves

upon the ground that the state statute is repugnant to the constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. (*Robb v. Connolly*, 111 U. S., 624.) And if the question is determined adversely to the defendants in the highest courts of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

The United States circuit court attempted to enjoin the attorney general from prosecuting in the supreme court of the state of Nebraska a suit entitled, "The State of Nebraska against The Chicago, Rock Island & Pacific Railway Company." In that suit the state prays for judgment against defendant for $310,000 for penalties for violations of a state law. In case of recovery the money will be paid into the state treasury as funds of the state. The attorney general has no interest in the funds. The suit can only be prosecuted by that officer, and if the injunction is valid, the state is as effectually enjoined as if it had been one of the parties directly restrained by the writ. The right of the state to be exempt from suits cannot be defeated by instituting actions against state officers charged with the duty of enforcing penalties against those who violate the laws of the state.

The question here presented was submitted to the supreme court of Nebraska in the suit the prosecution of which is forbidden by the decree assailed on this appeal. On motion to dismiss the suit for penalties the state court held that the preliminary restraining order of the federal court, "to the extent that it assumes to forbid the institution and prosecution of actions like the present one, is utterly and absolutely null," and that "the eleventh amendment to the federal constitution would be effectu-

ally emasculated if it were permissible to enjoin or coerce the agents through which a state performs its corporate functions." The head-notes and opinion by SULLIVAN, J., on the motion, are as follows (*State v. Chicago, R. I. & P. R. Co.*, 85 N. W., 556):

"1. An injunction issued by the circuit court of the United States cannot lawfully forbid the attorney general from suing for penalties claimed by the state under section 9 of the maximum freight law. (Compiled Statutes, ch. 72, art. 12.)

"2. It is a maxim of general jurisprudence that a party is not concluded by a judgment or decree rendered in an action to which he was not a party.

"3. The judicial power of the United States does not extend to actions brought by individuals or corporations against a state.

"4. A party is not released from his obligations to A because B has, by injunction or otherwise, prevented him from performing that obligation.

"SULLIVAN, J.: This is an action instituted in this court by the state to recover of the defendant company certain penalties claimed to be due under the act of 1893, known as the 'maximum freight law.' The defendant answered alleging that the attorney general had been enjoined by the circuit court of the United States for the district of Nebraska, from commencing or prosecuting any action under the provisions of said law. This allegation was constructively admitted and, thereupon, the defendant moved for judgment on the pleadings. The motion was submitted on the 5th inst., and taken under advisement. We have given the question in controversy considerable attention, and we are all of the opinion that the application for judgment should be denied.

"The preliminary order of the federal court is binding only on the parties to the action in which it was issued. To the extent that it assumes to forbid the institution and prosecution of actions like the present one, it is utterly and absolutely null. The judicial power of the United States does not extend to any suit in law or equity brought either by a natural person or a corporation against a state. The circuit court was therefore without power or author-

ity to enjoin the state, either directly or indirectly, from suing in its corporate capacity to recover a sum of money claimed to be due it as penalties under the maximum freight law. It is not only an unquestioned rule of the common law, but a maxim of general jurisprudence, that no one is concluded by a judgment or decree rendered in a case to which he was not a party. The state, in its corporate character, had no interest whatever in the suit in the federal court, and consequently the provisional injunction was ineffectual as to it, and equally ineffectual as to the attorney general and other officers or agents through which it must necessarily act in asserting its rights in courts of justice. The attorney general was not enjoined on the theory that he was acting as the agent of the state, but on the theory that he was acting without lawful authority from any source—that in attempting to enforce, for the benefit of the general public, the schedule of charges prescribed by the act of 1893, he was proceeding under color of an unconstitutional law, and was, therefore, individually liable as a wrong-doer. The writ operated upon him personally, and not upon him as an organ of the state. The eleventh amendment to the federal constitution would be effectually emasculated if it were permissible to enjoin or coerce the agents through which a state performs its corporate functions. Restraint or coercion of the agent would be, in everything but form, restraint or coercion of the principal.

"That the state is entitled to prosecute this action to judgment is a proposition abundantly supported by decisions of the supreme court of the United States; and it is almost needless to add that the right to sue includes the right to act through the attorney general. (*Louisiana v. Jumel*, 107 U. S., 711; *Cunningham v. Railroad Co.*, 109 U. S., 446; *Hagood v. Southern*, 117 U. S., 52; *In Re Ayers*, 123 U. S., 443; *Reagan v. Farmers' L. & T. Co.*, 154 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Harkrader v. Wadley*, 172 U. S., 148; *Fitts v. McGhee*, 172 U. S., 516; see also *McWhorter v. Pensacola & A. R. Co.*, 5 South. (Fla.), 129, and *Marshall v. Clark*, 22 Tex., 23.)

"The fact that the defendant has submitted to the injunction issued against it is of course no defense. If it has been rightfully enjoined, then the state cannot succeed in this action and no harm will be done; but if the

injunction was wrongfully issued the company must pay the penalties that have accrued to the state, and look to the injunction bond for indemnity. A party is not released from his obligation to A because B has, by injunction or otherwise, prevented him from performing that obligation.

"There may be another reason why the injunction against the attorney general is not valid. It was issued by the United States district judge in 1893, and it does not appear that it has been continued *in force* by the circuit court. It is our understanding that an order of this kind does not possess such extraordinary vitality; but as the point was not at all discussed by counsel at the bar, or in the briefs, we do not make it to any extent the basis of our decision. The motion for judgment is denied."

The following cases were cited by Judge SULLIVAN to sustain his ruling that the federal court is without jurisdiction to enjoin the attorney general from prosecuting in the state court the suit brought in the name of the state to recover penalties:

In *Fitts v. McGhee*, 172 U. S., 516, the report of the case shows that the circuit court of the United States enjoined the attorney general of Alabama from enforcing a statute fixing maximum rates of toll on a railroad bridge. The act was passed February 9, 1895. Relief was granted on the ground that the act violated the federal constitution in denying to the railroad company the right to charge rates of toll that were fairly and reasonably compensatory. On review in this court it was held that the action was a suit against the state, and that therefore the circuit court had no jurisdiction. The opinion was delivered by Mr. Justice HARLAN, who made use of the following language:

"As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record."

In *Louisiana v. Jumel*, 107 U. S., 723, it was shown that under statutory and constitutional provisions, the state of Louisiana issued and negotiated bonds, fixed the rate of interest, and provided for the creation of a fund for payment. By subsequent constitutional amendment the state attempted to change the terms of interest fixed in the bonds. Bondholders instituted actions to prevent the state officers from diverting the money created under the original enactments to purposes other than those for which the fund was created. Relief was sought on the ground that the state was forbidden by the federal constitution to impair the obligation of its contracts. The actions were defended on the theory that the eleventh amendment to the federal constitution exempted the state from suit. Though the state was not a party, this court affirmed the order of the trial court dismissing the suits, on the ground that it had no jurisdiction. It was said in the opinion:

"The officers owe duty to the state alone, and have no contract relations with the bondholders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it like other funds in the treasury, and pay it out according to law. They can be moved through the state, but not the state through them."

Cunningham v. Macon & B. R. Co., 109 U. S., 446, was a suit to foreclose a mortgage against a railroad company and to set aside a sale to the state of Georgia under foreclosure of a prior mortgage. Though the state officers were defendants, a judgment of dismissal was affirmed on the ground that the entire interest adverse to plaintiff was the interest of the state of Georgia, and the federal courts were without jurisdiction in suits prosecuted against the state. Mr. Justice MILLER made use of the following language:

"Whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though some interest of hers may be more or less affected by the decision."

In *Hagood v. Southern*, 117 U. S., 52, the trial court, by decrees against state officers, attempted to specifically enforce the contract obligations of the state in relation to revenue bond script. In setting aside the decrees, it was said by Mr. Justice MATTHEWS:

"The defendants in the present cases, though officers of the state, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the state cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the state is an indispensable party, without its presence. This, however, the circuit court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the state through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit."

In *Re Ayers*, 123 U. S., 497, the following language was used:

"The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia, in its own name and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing

that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its governor and attorney general, according to the precedents in such cases. *New Jersey v. New York*, 5 Pet., 284, 288, 290; *Kentucky v. Dennison*, 24 How., 66, 96, 97; Rule 5 of 1884, 108 U. S., 574. If a decree could have been rendered enjoining the state from bringing suits against its tax-payers, it would have operated upon the state only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its attorney general, and the commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

"The nature of the case as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362, recognizes the rule that the court does not acquire jurisdiction "where the suit is brought against the officers of the state, as representing the state's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."

In *Harkrader v. Wadley*, 172 U. S., 143, the report shows that defendant had been indicted in Virginia, in a state court; that he had been in custody of a county sheriff; that the circuit court by injunction restrained the state officers from further prosecution of defendant under the indictment; that the injunction was disre-

garded, and custody of defendant retained; and that the federal court subsequently discharged him on habeas corpus. On review in this court defendant's custody was restored to the county sheriff, the court saying:

"A circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to enforce the criminal laws of such state."

While this court is not bound by the ruling of a state court on a federal question, I have been constrained to present the able opinion of the Nebraska supreme court as worthy of consideration here, not only on account of the great learning of the judge delivering it, but also because of its intrinsic merit and the array of federal precedents with which he has fortified his conclusion that the federal court has no jurisdiction to enjoin the attorney general of Nebraska from prosecuting a suit in the name of the sovereign state to collect penalties for a violation of its laws.

For the reasons stated it is insisted that the decree below should be reversed and the suit in the circuit court dismissed.

Respectfully submitted,

F. N. PROUT,
Attorney General.

LINCOLN, NEBRASKA, March 24, 1902.

In the Supreme Court of the United States.

October Term, 1902.

No. 150.

FRANK N. PROUT, ATTORNEY GENERAL,
Appellant,

v.

JAMES C. STARR, ET AL., IMPLEADED WITH THE CHICAGO ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Brief for Appellees Star and Allerton.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska.

On the 3rd of August, 1893, these appellees, stockholders of the Chicago, Rock Island & Pacific Railway Company hereinafter called the Rock Island Company, filed their bill in the Circuit Court of the United States for the District of Nebraska against the Company and Hastings, Attorney General; Allen, Secretary of State; Moore, Auditor of Public Accounts; Bartley, Treasurer; and Humphrey, Commissioner of Public Lands of the State, who together, constituted

the Board of Transportation thereof and Dilworth, Kountz, and Johnson who were Secretaries of the said Board. In their bill, the plaintiffs alleged among other things that the Rock Island Company owned and operated lines of railroad from Chicago in Illinois, to Denver in Colorado, by way of Omaha, Beatrice, and Fairbury, in Nebraska, and that the legislature of Nebraska had passed an act entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act" approved April 12, 1893; that the rates fixed in said act were one-fifth less than those theretofore charged by said Company; and that if said act and the said rates therein prescribed should go into operation, the earnings of said Company from its business in the state and especially from its freight business, would be more than one-fifth less than it had theretofore realized, and would not pay the operating expenses thereof, nor yield any money from which the said property may be maintained, and would in effect work a confiscation thereof; that the said defendants threaten, and unless restrained by the order and injunction of this Court, will put in action the full powers of said board under the said act, and the other

laws of said State, and enforce the commands, injunctions and prohibitions thereof against said Company, and order the Attorney General and the county attorneys of the several counties through which said road or any or either of them run, to institute suits to compel said Company to comply with the orders of the said board in that behalf; and apply to the Supreme and District Courts of the state, in its name, on the relation of the board, for writs of mandamus to compel said Company to obey the said orders; and also require the Attorney General and the said county attorneys to prosecute said Company for each and every act done or omitted, commanded, or forbidden by said statute, and seek to impose upon said Company, the severe penalties therein prescribed; which actions and proceedings would be numerous, and if effectively prosecuted, would sweep away all of the said Company's property; that the said Attorney General had given notice to the Company that it was his purpose and the purpose of said board to enforce against it, all of the provisions of said above mentioned act promptly, vigorously and to the full extent of the powers conferred upon him and upon the board in that behalf, if the Company do or omit to do any of the matters and things in the said act commanded or forbidden, and that the said Attorney General would

personally take charge of such proceedings and prosecute them to the full extent of the said act; that the roads of said Company in the said state had never earned upon the business thereon, their operating expenses and fixed charges, although its administration had been conducted with exceptional skill and judgment, and returns from its business were all that the same could be made to render.

And the said plaintiffs in their said bill insisted that the said act if put into force, would take from the said Company its property without compensation and without due process of law, contrary to the provisions in that behalf of the Constitution of the United States.

Many facts and circumstances were set forth and pleaded in the said bill, supporting the above and other contentions. The plaintiffs further alleged that they were stockholders of the Company and had applied to its officers and directors to take proceedings to contest the validity of said act and resist all actions to enforce it, but they had refused to do so, and they prayed that the said Company, its officers, agents and employees, be by the order and injunction of this Court, enjoined from making, or publishing, or posting in its depots and stations, a schedule of rates to be charged by it for the transportion of freight

on or over its said roads, according to the terms, provisions and commands of the above entitled act, and from reducing its charges for such service from the rates then charged by it to those prescribed by the said act, and from obeying, observing or conforming to the commands, provisions, injunctions and prohibitions of said act or any thereof; and that the said Board of Transportation, and its members and secretaries, be also enjoined from entertaining or determining any complaint against said Company for or on account of any act or thing by its officers, agents, servants or employes done, suffered or omitted which may be commanded or forbidden by said act, and from instituting, or prosecuting, or causing to be instituted or prosecuted any action or proceeding against said Company for any act or thing by it or its officers, agents, servants or employes done or omitted, which may be forbidden or commanded by said act; and that the said Hastings, Attorney General of said state, be in like manner enjoined from bringing or aiding in bringing, or causing or advising to be brought, any proceeding by way of injunction or mandatory or other process or civil action or indictment against said Company for or on account of the non-observance by it of the provisions of the said act; and that if any county attorney or other person should bring or

threaten to bring any action or proceedings to the like effect, his name should be inserted in the said bill as a defendant, and he be in like manner enjoined from instituting, prosecuting or advising any such actions or proceedings; and that the said act be by the decree of the Court declared to be repugnant to the provisions of the Constitution of the United States, and of said state, and that it be further decreed that the said injunction therein prayed, be perpetual.

Thereupon, an order of said Court was issued enjoining the said railroad company, its directors, officers, agents and counselors and the said Board of Transportation and its members and the said Attorney General as in the said bill prayed; which order was duly served upon each and every of the said defendants, together with process of subpoena.

At the same time, three other bills were filed in said Court, one by stockholders of the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington Company, another by stockholders of the Chicago and Northwestern Railway Company, hereinafter called the Northwestern Company; and a third by stockholders of the Union Pacific Railway Company, hereinafter called the Pacific Company, the defendants therein were, in one of said bills the Burlington, in another the Northwestern, and in the

third, the Union Pacific Railway Company, and in all of them the officers of said state, composing the Board of Transportation, and the secretaries thereof. In all said bills, the same facts and circumstances were alleged and the same relief prayed as in the bill against the Rock Island Company. All of the said state officers appeared and answered by the same counsel and alleged the same facts, circumstances, defenses and contentions, and particularly that "they and each of them and all of them are officers and agents of said State of Nebraska, and have no personal or pecuniary interest whatever in the event of this suit, or in the result of the several matters and things charged and set forth in said complainant's bill of complaint herein filed, and are not proper parties thereto, but that said bill of complaint should of right have been brought against the State of Nebraska, and not against these defendants, or either of them, and that the said State of Nebraska is the real party in interest, and that said State of Nebraska hath not and doth not in any way whatever consent to the bringing of this action, and hath not and doth not submit in any way to the jurisdiction of said Court to hear and determine the several matters in difference charged and set forth in complainants' bill of complaint, and these defendants submit that under the Eleventh

Amendment of the Constitution of the United States, the courts of the United States are wholly without jurisdiction to try, hear and determine the several matters in difference charged and set forth in said complainants' bill of complaint and that under the Constitution of the United States and the Constitution and laws of the State of Nebraska, said complainants have a full, complete and adequate remedy at law for all the matters alleged and set forth in said complainants' bill of complaint."

Voluminous proofs were taken in the Burlington, Northwestern and Union Pacific cases; and decrees were rendered according to the prayer of the bills therein, which have been substantially affirmedby this Court.

In consequence of the great expense attending the taking of the proofs, pending the four suits, the parties to this suit plaintiffs and defendants, agreed that the proofs in the three cases should be taken and accepted in the Rock Island case with the same force and effect as if taken therein; that the said case should not be further particularly proceeded in until the Supreme Court shall have rendered its decree in the other three cases, when a decree should be entered in the Rock Island case conformable to those entered by the Supreme Court in the other three cases. Accord-

ingly no testimony has been taken in the Rock Island case.

Hastings, the Attorney General when the bills were filed, was, pending the appeals, succeeded by Smyth, who, by proper order was substituted as defendant and appellant.

In 1890, Smyth as Attorney General brought an action in the Supreme Court of the State in the name of the State against the Rock Island Company, alleging that the Company, in violation of the Act of April 12, 1893, at divers times had charged for the transportation of freight between points on its road in Nebraska, rates in excess of those fixed by the act, and claimed judgment for $310,000 besides interest and costs. His attention being called to the injunction order issued upon the bill of the plaintiffs, he gave their counsel to understand that before the expiration of his term of office, then shortly to ensue, he would dismiss the action; relying upon which agreement and understanding, the plaintiffs took no proceedings to enforce the injunction order, nor were any proceedings taken in the action, except to take a stipulation extending the time of the defendant to answer.

The appellant succeeded Smyth in January, 1891, and being informed of Symth's agreement he declined

to dismiss the action for the penalties. The Company then filed its answer alleging the injunction, to which no reply was ever filed. On the 15th of February, the Company moved the Court for judgment on the pleadings, which was overruled upon grounds set out in its opinion.

The opinion is fully set out in the appellant's brief and is reported under the style of *State v. Chicago, Rock Island & Pacific Railway Company*, 61 Neb., 545. No further proceedings have been had in said action. The injunction has never been vacated, modified or discharged, and is in full force and effect.

Attorney General Smyth also brought another action in one of the District Courts, for the State against the Company, for $150,000, his petition being in the same terms as that filed in the action in the Supreme Court, but it has been dismissed and need not be further mentioned.

On the 6th of April, 1901, Starr and Allerton filed their supplemental bill reciting briefly the contents of their original bill, and of the answer thereto, the issue and service of the injunction, and then proceeded as follows:

> "At or about the time when your orators exhibited their said bill in this Honorable

Court, three several bills were filed therein by the stock holders of the Chicago, Burlington & Quincy Railroad Company, the Chicago & Northwestern Railway Company, and the Union Pacific Railroad Company, respectively, in which substantially the same facts were alleged as were stated by your orators in their original bill first above referred to; and in and by the said bills, relief was prayed substantially the same as that prayed by your orators in their said bill. The defendants in the said three several bills, were the said companies respectively, and the members and secretaries of the Board of Transportation. Said defendants answered the said three several bills by alleging substantially the same facts as were alleged by them in answer to that of your orators, and the defendants in all of said four bills appeared and were represented by the same counsel. Voluminous proofs were taken upon the said three several bills, and the same came on to be heard before your Honors in this Honorable Court, whereupon decrees were rendered according to the prayer thereof: which decrees have been substantially affirmed by the Supreme Court of the United States. In con-

sequence of the great expense of taking the said proofs upon the said bills of your orators, it was agreed and understood, that the proofs upon the three several bills above mentioned, should be taken and accepted as proofs upon the said bill of your orators, with the same force and effect as if taken thereon; and that your orators' said bill should not be further particularly proceeded upon until the decree of the Supreme Court upon the three other bills already mentioned, should be rendered; and that whatever decree should finally be rendered by the Supreme Court upon the three bills removed thereto upon appeal, should be entered in this Honorable Court upon that of your orators. pending the prosecution of the three several bills in this Honorable Court and the appeals from the decrees thereof, in pursuance of the aforementioned agreement, no testimony was taken upon the said bill of your orators."

The prayer was as follows:

"Wherefore, your orators pray that the order and injunction allowed by this Honorable Court upon their bill, be extended to and against the said Frank N. Prout as Attorney

General of said state, and by the order of your Honors, he be subjected to the commands, injunctions and prohibitions therein set forth; and that said Attorney General be particularly enjoined and restrained from further prosecuting the two several actions brought in the name of the State of Nebraska against the said railway company, and in anywise proceeding therein; and that your orators and the other stockholders of said Company, have all such other and further relief as the circumstances require and is agreeable to equity and good conscience."

To this supplemental bill the appellant filed his demurrer on the ground that the bill was against the defendant in his official capacity as Attorney General of the State and was against the State and therefore the Court was under the eleventh amendment of the constitution without jurisdiction.

This demurrer was argued before Sanborn, Circuit Judge, and Munger, District Judge, and was overruled; and the injunction prayed for was issued.

The order directing the injunction provided that if the appellant elected to stand by his demurrer and declined further to plead, decree should go as in the case of *Smyth v. Ames*; and he having announced in

open Court that he declined to further defend against the said bills, decree was rendered conformable to that in *Smyth v. Ames.*

I.

It is enough for the purposes of this case that the parties to it agreed that it should abide the event in this Court of the other three cases.

This was, under the circumstances, a very proper arrangement. The supplemental bill alleges that the bills in all the four cases stated the same facts and prayed the same relief; that the answer in all of them stated the same matters; that the counsel for the defendants were the same, and that the Circuit Court rendered decrees according to the prayer of the bills. All these allegations of the supplemental bill are admitted by the demurrer thereto.

Furthermore, the bill alleged, and the demurrer admitted, that voluminous proofs had been taken in the three cases, and that the expense of taking them over again would be very great.

Under these circumstances, an agreement in the Rock Island case that it should abide the result here of the three cases was eminently proper.

The supplemental bill alleges and the demurrer

admits that it was agreed that whatever decrees should be rendered by this Court in the three cases pending here on appeal, should be entered in the Circuit Court upon the Rock Island bill; that the decrees of that Court were substantially affirmed and that the parties acted on their agreement, and took no testimony upon the Rock Island bill.

In such a case the Circuit Court should enforce the agreement by entering a decree like those rendered here.

The Pacific Railroad v. Ketchum, 101 U. S., 289, was a bill filed in the Circuit Court for the Eastern District of Missouri, by Ketchum, a stockholder of the Company, for the foreclosure of a mortgage on its road and other property, to secure certain bonds and interest thereon, against the Company and the trustees appointed in the mortgage, on account of a default in the payment of interest. There were three mortgages of the company on the property prior to that alleged by Ketchum. Proper allegations were made in the bill justifying Ketchum in bringing it. Three other stockholders, upon their application, were admitted as plaintiffs with Ketchum; and others were, upon their request, made defendants. After various proceedings in the suit, a decree of the Circuit Court was rendered, reciting that "by the consent of

all parties to the suit, through their solicitors of record," decree was rendered "that the said Pacific Railroad do stand absolutely barred and foreclosed of and from all equity of redemption of, in and to the mortgage premises, property and franchises" and ordering that the same be sold. The Railroad Company appealed to this Court and the question was raised whether the Company was bound by the consent recited in the decree.

Mr. Chief Justice Waite delivered the opinion of the Court, in which he said on page 297:

> "This disposes of all mere errors in form which are alleged against the decree. Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the Court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings. It was within the power of the parties to this suit to agree that a decree might be entered for a sale of the mortgaged property without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment. It was also competent for them to agree that if the property was bought at the sale by

or for the bondholders, payment of the purchase money might be made by a surrender of the bonds. And so of all the other provisions of the decree which are complained of. All these were matters about which the parties might properly agree; and having agreed, it does not lie with them to complain of what the Court has done to give effect to their agreement."

In such a case, the Court would enforce the agreement by entering a decree like that rendered by this Court.

II.

But had there been no agreement to abide the result of the three cases of the Burlington, Northwestern and Union Pacific Companies, the decision of the question of jurisdiction in them is conclusive in the case at bar. The issues, circumstances and contentions in those cases, were in all respects precisely the same as in this, as well those relating to jurisdiction, as all other matters. There is no possible room for any distinction between them.

In the three cases, Mr. Justice Harlan delivered the opinion of the Court, and said on this subject:

Smyth v. Ames, 169 U. S., 466 (518).

"Another question of a preliminary character must be here noticed. The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction consistently with the Eleventh Amendment of the Constitution of the United States. This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State Board. It would therefore be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction not only upon the ground of the diverse citizenship or alineage of the parties, but upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that, within the

meaning of the Eleventh Amendment of the Constitution, the suits are not against the State but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment. *Pennoyer v. McConnaughy*, 140 U. S., 1, 10. *In re Tyler*, 149 U. S., 164, 190; *Scott v. Donald*, 165 U. S., 58, 68; *Tindal v. Wesley*, 167 U. S., 204, 220."

All this must be retracted without reservation or the contention of the appellants here must be overruled. There is no alternative.

And not only is this true of the three cases in which the opinion was delivered, but it is equally so of several others.

Reagan v. Farmers' Loan & Trust Company, 154 U. S., 362, is one of them. In 1891, the legislature of the State of Texas passed an act to establish a rail-

road commission, providing that the commission should make rates for the transportation of freight and passengers on all railroads in that state, and provided penalties to be imposed upon any Company which should charge, collect, demand, or receive a greater charge or compensation than that fixed by the said commission; and made it the duty of the Attorney General to institute suits in the name of the state for the recovery of the penalties prescribed by the act.

Reagan, McLean, and Foster were duly appointed and qualified as members of the commission. Culbertson was the Attorney General of the state. The commission proceeded under the act to establish rates, and the Farmers' Loan & Trust Company filed its bill in the Circuit Court of the United States for the Western District of Texas, against the three railroad commissioners, the Attorney General and certain other parties not material here to be mentioned. After alleging certain preliminary facts, the bill averred that the rates fixed by the commission were unreasonable and unjust, setting forth facts, which, it claimed, established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing them, and the Attorney General from instituting any suits against the Company to recover

damages for failing to conform to such rates. The case came on to be heard upon demurrer to the bill, which was overruled, and, the commissioners and Attorney General refusing to answer, the bill and amendments thereto were taken as confessed and a decree was rendered, enjoining Culbertson acting as Attorney General of the state and his successors in office, from instituting or authorizing or directing any suit or suits, action or actions against the said Railroad Company for the recovery of any penalties under and by virtue of the provisions of the act creating the commission.

Mr. Justice Brewer delivered the opinion of the Court in which he said:

> "We are met at the threshold with an objection that this is in effect a suit against the State of Texas, brought by a citizen of another state, and, therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal Court."

Having thus stated the question, the learned judge proceeded to examine it upon the authorities and upon principle, quoting from the opinion of Mr. Justice Lamar in *Pennoyer v. McConnaughy*, 140 U. S., 1, as follows:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the states against a state without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party

against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, 123 U. S., 443; *Louisiana v. Jumel*, 107 U. S., 711; *Antoni v. Greenhow*, 107 U. S., 769; *Cunningham v. Macon & Brunswick Railroad*, 109 U. S., 446; *Hagood v. Southern*, 117 U. S., 52.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state. *Osborn v. Bank of the United States*, 9 Wheat., 738; *Davis v. Gray*, 16 Wall., 203;

Tomlinson v. Branch, 15 Wall., 460; *Litchfield v. Webster County*, 101 U. S., 773; *Allen v. Baltimore & Ohio Railroad*, 114 U. S., 311; *Board of Liquidation v. McComb*, 92 U. S., 531; *Poindexter v. Greenhow*, 114 U. S., 270."

Applying the principle thus clearly stated to the case in hand Mr. Justice Brewer goes on to say, p. 390:

"So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the Railroad Company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar

> will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of Courts, State and Federal, is in restraining the collection of taxes, illegal in whole or in part."

Then the learned judge found that Culbertson, the Attorney General did not represent the State so as to make the judgment if against him effective against it. The Attorney General and this appellant were both impleaded in the bills, having the same official character and the same duties, and were threatening the same wrongs and injuries against the companies. There is no possible distinction to be taken between them.

III.

But were the question open to re-examination, the doctrine announced in those cases must be affirmed and applied here. That doctrine is that if in an action against State Officers, they seek shelter under the Eleventh Amendment, it must appear that a

judgment against them will operate effectively upon the rights or property of the state. If, on the other hand, they fail to connect themselves with the state by not showing that they as officers represent it in such a way that it will be affected by a judgment against them, they are, although officers, wrong doers; and as such, personally liable and not exempt from suit under the amendment. And they will fail if they allege a statute which is unconstitutional, just as much so as if they could not show that they were officers. Applying this doctrine the question what is the interest of the party against which relief is in fact asked and against which the decree effectively operates, is answered by Mr. Justice Brewer in the clause quoted above at page 24 of this brief.

If the clause of the injunction prohibiting actions for penalties be singled out, and it be said that money recovered in an action by and in the name of the State against the Company will go into the state treasury, the short answer is that by virtue of a constitutional provision, all those moneys go to the counties through which the road runs, and do not go into the state treasury, and the State has no right to them or interest on them.

Section 5 of Article VIII of the Constitution provides that:

"All fines, penalties and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties and license moneys, arising under the rules, by-laws, or ordinance of cities, villages, towns, precincts or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue."

IV.

This decree is supported by another principle. That principle is that if two courts have concurrent jurisdiction of a controversy, the one in which suit is first brought will retain it until final disposition, to the entire exclusion of any process or inquiry in the other; or, stating it with reference to the facts of this case, if the State and Federal Courts had concurrent jurisdiction of this controversy, the original bill of the plaintiffs having been filed in the Circuit Court in 1893, and the State having brought its action in the State Court in 1900, the former must

proceed to decree without interference by the latter. We feel sure that the learned appellant will admit that a proper State Court could rightfully entertain the bill of these plaintiffs, when the defendants undertook to justify the acts complained of by an unconstitutional and therefore void Statute.

So too, this bill was within the jurisdiction of the Federal Court. As Mr. Justice Brewer says in Reagan's case, *supra*, at page 391.

> "Nor can it be said in such a case that relief is obtainable only in the Courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal Courts to maintain a like defence. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own Courts. Given a case where a suit can be maintained in the Courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal Courts. *Cowles v. Mercer County*, 7 Wall., 118; *Lincoln*

County v. Luning, 133 U. S., 529; *Chicot County v. Sherwood*, 148 U. S., 529."

The case then is that of concurrent jurisdiction in two Courts and of a suit brought in one of them, and the defendant therein afterwards bringing another involving the same matter and inquiry.

The rule which we have stated above, was declared by this Court at an early day, and has been enforced and illustrated, in a long series of cases.

One of the earlier cases is that of *Peck v. Jenness*, 7 How., 612. Jenness, Gage & Company sued Peck & Bellows in one of the State Courts of New Hampshire and on the 10th of October, 1842, sued out an attachment which was levied upon the goods of the defendants.

On the 28th of December, 1842, the defendants were declared bankrupts by the District Court of the United States for New Hampshire, and Howland was appointed their assignee. On the 21st of June following, the defendants received a certificate of discharge. On the 25th of July following, Howard, the assignee, presented to the Distict Court a petition setting forth the plaintiff's attachment and averring that it was not a valid lien on the goods, and that, therefore, the sheriff had no right to detain them and prayed that the sheriff be ordered and decreed to surrender them to

the assignee or account for their value, and the Court decreed accordingly. The judgment was carried to this Court by a writ of error under the 25th section of the Judiciary Act. The question presented to this Court was, whether the District Court was vested with any power or authority to oust the State Court of its jurisdiction over the cause and supersede its judgment.

Mr. Justice Grier delivered the opinion of the Court, in which he said: (p. 624.)

> "It is a doctrine of law too long established to require a citation of authorities, that, where a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other Court; and that, where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

Chittenden v. Brewster, 2 Wall., 191, was a creditor's suit brought in the Circuit Court for the Northern District of Illinois against a judgment debtor and his assignees, to set aside an assignment made by him to Brewster and Clark to hinder and delay creditors. The assignment purported to convey to the assignee all of the property of the debtor in trust to convert the same into money and pay certain preferred creditors. In their answers, the assignees alleged that after the filing of the creditor's bill, a bill in chancery had been filed in the State Court against them in behalf of other creditors of the judgment debtor, praying a receiver to take possession and charge of the property conveyed by the assignment, and to have the trusts created thereby carried into effect; a receiver was appointed and in pursuance of the order of the State Court, all the property had been transferred to him. Brewster appeared to this bill, but did not answer or otherwise defend against the same. A decree was rendered ordering the trusts in the assignment carried into effect and appointed Mitchell receiver to whom Brewster assigned all the property. The bill filed in the Federal Court came on to be heard upon the pleadings and proofs and the Court declared the assignment void and set it aside, and appointed Moulton receiver to whom the

debtor and the assignees were ordered to assign and transfer all the property which had come to their hands, except such as since the service of process, had been transferred to the receiver appointed by the State Court.

From this decree, the plaintiffs appealed to this Court on the ground that the proceeding in the State Court should have been treated as an interference with the federal jurisdiction previously acquired.

Mr. Justice Nelson delivered the opinion of the Court, in which he said that it was incumbent upon the assignees that:

> "They should have appeared and defended that suit; and, in addition to the defence on the merits, that is of their faithful execution of the trust, which was impeached by the bill, they should have set up the pending proceedings against them in the Federal Court, which tribunal had first acquired jurisdiction over them, and over the fund in dispute, and were entitled to deal with it, and with all questions growing out of the relations existing of debtor and creditor of the parties concerned. Instead, however, of pursuing this course, no defence, as appears, was set up by the defendants to the suit; no answer filed, nor even opposition made

to the motion for the appointment of a receiver. The only part they seem to have taken in the proceedings is, besides acknowledging service of the notice of the motion for a receiver, the solicitors entered their appearance in the cause, and gave consent that the motion might be made at the then February Term of the Court. It was at once made, and the receiver appointed and gave the requisite security.

"Now, we think, here was a clear omission of duty on the part of the defendants, as trustees and bailees of the property in question, and for which they should have been held personally responsible. They should have appeared and defended the suit in the State Court, and set up the pending proceedings in the Federal Court, which was a complete answer to the jurisdiction of the former; and if this defence had been overruled, a remedy existed by a writ of error to this Court, under the 25th section of the Judiciary Act."

Orton v. Smith, 18 How., 263, was a bill of peace authorized by the Statutes of Wisconsin in respect of certain lands, of which Smith, the plaintiff, and Orton, a defendant, claimed title, and prayed an injunction against Orton to prohibit him from setting

up his claim and therby casting a cloud upon the title of the plaintiff. During the pendency of this bill, Orton filed his bill in chancery in the Circuit Court of Milwaukee County, Wisconsin. The Circuit Court of the United States decreed the title to Smith and went on to provide as follows:

> "And, further, that the said defendant, John J. Orton, be, and hereby is, perpetually enjoined and forever barred from setting up or asserting any claim in or right to said premises, by virtue of or upon said bond and assignment. But this injunction and decree are not in any way to affect or operate against him, the said John J. Orton, in the prosecution of a bill pending in the Circuit Court of Milwaukee County, in this State, wherein he is complainant, and David Knab is defendant; this Court not intending to enjoin a proceeding in the State Court."

Mr. Justice Grier delivered the opinion of the Court, in the course of which he stated the rule as follows:

> "It is a rule absolutely necessary to be observed by Courts which have concurrent jurisdiction, that in all cases 'where the jurisdiction of a Court and the right of a plaintiff to prosecute his suit in it have once attached, that

right cannot be arrested or taken away by proceedings in another Court.' This rule, it is said, 'has its foundation not merely in comity, but in necessity. If one may enjoin, the other may retort by injunction, and thus the parties be without remedy.' See *Peck v. Jenness*, 7 How., 625; *Taylor v. Royal Saxon*, 1 Wall., 311."

Sharon v. Terry, 36 Fed. R., 337, was a bill filed on the 3rd of October, 1883, by William Sharon in the Circuit Court of the United States for the District of California, against Mrs. Hill, afterwards Mrs. Terry, for a decree adjudging a certain paper in her possession purporting to be a declaration of marriage between them, to be a forgery enjoining its use and directing its cancellation.

The bill alleged that the defendant claimed to be the lawful wife of the plaintiff and had made this declaration which under a statute of the state, constituted a marriage. The plaintiff alleged that these claims were wholly and maliciously false and made by the defendant for the purpose of injuring the plaintiff in his property, business and social relations, and of obtaining credit by the use of his name with merchants and others and thereby compelling him to maintain her, and of harrassing him, and, in case of

his death, his heirs, next of kin and legatees, into the payment of large sums of money to quiet her false and fraudulent claims and pretentions. The bill prayed that it be decreed that the defendant was not and never had been the wife of the plaintiff; that he did not make the said declaration of marriage or any marriage between them, and that she be enjoined and restrained from making such allegations of marriage with him, and that the said declaration be adjudged false, fraudulent, forged and counterfeited and be ordered to be delivered up to be cancelled and annulled. Subpœna was issued and served upon the defendant.

Afterwards, she commenced an action in one of the courts of the state against Sharon, alleging in her complaint that they were married by virtue of the said declaration, and praying that her marriage be declared legal and valid, and, then, that she be divorced from him by reason of certain infidelities to his marriage contract. Sharon answered, denying that he was ever married to her and alleging that the declaration of marriage was a false and forged instrument.

To the bill in the Circuit Court of the United States, the defendant, by plea in abatement, alleged the pendency of the action in the State Court, which was then on trial; insisting that the Circuit Court

ought to stay its proceedings in the original suit, until the State Court had expressed its opinion in reference to the validity of the contract, and then accept its judgment as conclusive. A supplemental answer was filed, alleging that the State Court had filed its decree and findings, re-affirming its adjudication of the genuineness of the contract. Replications having been filed and proofs taken by the parties, the cause was submitted to the Court, which decreed that the declaration of marriage was not signed or executed by Sharon and was not his declaration, but was false, counterfeit, fabricated, forged and fraudulent and null and void; and the defendant was decreed to deposit the same with the clerk of the Court, to be endorsed "cancelled;" and that the defendant, her heirs, assigns, executors, administrators and all persons claiming under her and her agents and attorneys be perpetually enjoined from alleging the genuineness or validity of the said instrument and from making any use of it in evidence or otherwise to support any right claimed under it, or making any claim or setting up any right, interest or claim of any kind, nature or by virtue of said declaration as Sharon's wife, and for any interest or right of any kind against him, his heirs, executors, administrators or successors in interest. Sharon died, pending the

bill, leaving a will of which he named his son and son-in-law executors. The son-in-law having declined to act, letters testamentary were issued to the son, who filed a bill of revivor.

The bill came on to be heard before Mr. Justice Field, Circuit Judge Sawyer and District Judge Sabine.

Upon the question how far the judgment of the Federal Court was affected by that of the State Court, the learned Justice speaks at length as follows: (p. 855.)

> "As congress has made such careful provision to secure to citizens of other states a right to transfer to a Federal Court cases in which they are sued in state courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant properly summoned in the first instance into that Court by a citizen of another state, could cut off and practically nullify the latter's constitutional right to a hearing thereby instituting a suit in a state court, which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be tolerated. The jurisdiction of the Federal Court having

attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other."

And many cases were cited in the reports of the State and Federal Courts.

The last case decided by this Court, is that of *Harkrader v. Wadley*, 172 U. S., 148, which was an appeal in proceedings upon a petition for *habeas corpus*.

In October, 1893, two suits in equity were brought in the Circuit Court of the United States for the Western District of Virginia by creditors of the Wytheville Banking & Insurance Company, a corporation of the state of Virginia, against that Company, Wadley, and the commonwealth attorney and special attorneys, to settle the affairs of the Company. Afterwards, Wadley was indicted in one of the Courts of the state of Virginia for the embezzlement of the funds of the company.

The Circuit Judge, Simonton, enjoined the commonwealth's attorney, special prosecutors and the creditors of the company from further proceedings upon the indictment and from exacting and requiring any bail or any commitment to imprisonment of Wadley thereon. Notwithstanding which he was taken and detained in custody.

Mr. Justice Shiras delivered the opinion of the Court and states the question thus:

> "Had the Circuit Court of the United States authority to issue a writ of *habeas corpus* to take and discharge a prisoner from the custody of the State Court when proceeding under a state statute not repugnant to the Constitution or laws of the United States, under which the prisoner had been indicted, for an offense against the laws of the state?"

And states the rule which we invoke above as follows: (P. 164.)

> "When a State Court and a Court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule

applies alike in both civil and criminal cases. *Freeman v. Howe*, 24 How., 450; *Buck v. Colbath*, 3 Wall., 334; *Taylor v. Taintor*, 16 Wall., 366; *Ex parte* Crouch, 112 U. S., 178.

* * * * * * *

"But it is claimed under the second of the above propositions, that as the Circuit Court of the United States had obtained prior and therefore exclusive jurisdiction of the affairs and assets of the Wytheville Banking and Insurance Company, a corporation of the State of Virginia, by virtue of two suits in equity brought in said Court in October, 1893, by creditors of the said banking company, in which suits a receiver to take charge of the property of the bank, and a master to take all necessary accounts, had been appointed, it followed that the State Court had no jurisdiction, pending those suits, to proceed by way of indictment and trial against an officer for the offence of embezzlement, as created and defined by a valid statute of the State of Virginia. For the State Court to so proceed, it is claimed, constituted an interference with the Federal Court in the exercise of its jurisdiction; and that hence it was competent for the United States Court to

grant an injunction against the prosecution of the criminal case and to release the prisoner by a writ of *habeas corpus* directed to the sheriff."

And on page 166 he further says:

"It is further contended that when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the Court, by a bill in equity, as to the matter or right involved, a bill for an injunction will lie to prevent interference by criminal procedure in another Court; and the decision of this Court *in re Sawyer*, 124 U. S., 200, is cited, where Mr. Justice Gray said: 'Modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*' So, also, the case of *The Mayor, etc., of York v. Pilkington*, 2 Atkins, 302, is cited, and in that case, where plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defend-

ant to be indicted at the York Criminal Court for a breach of the peace for such fishing. Lord Hardwicke awarded an injunction to restrain the plaintiff from all further criminal proceedings in other Courts, and said that if a plaintiff filed a bill in equity against a defendant for a right to land and a right to quiet the possession thereof, and after that he had preferred an indictment against such defendant for a forcible entry into said land, the court of equity would certainly stop the indictment by an injunction.

"But the observations quoted had reference to cases where the same rights were involved in the civil and criminal cases, and where the legal question involved was the same. Thus the case of the fishery, both in the civil and the criminal proceeding, involved the right of the defendant to fish in certain waters where the plaintiff claimed an exclusive right, and, as no actual breach of the peace was alleged, the public was not concerned. And when, in the later case of *Lord Montague v. Dudman*, 2 Vesey, 396, where an injunction was prayed for to stay proceedings in a mandamus, his ruling in *Mayor of York v. Pilkington* was cited, Lord Hard-

wicke said: 'This Court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information. As to *Mayor of York v. Pilkington*, the Court granted an order to stay the proceedings because the question of right was depending in the Court in order to determine the right, and therefore it was reasonable they should not proceed by action or indictment until it was determined.'"

While the learned Judge does not state the rule here invoked in terms yet he assumes it to be the law, and declines to apply it in the case before him, because the facts and circumstances of the bill in the United States Court and of the indictment in the State Court were not the same. Had they been the same, all that he says goes to show that he would have held that Wadley would have been entitled to be discharged, because the proceedings in the State Court would have been without jurisdiction. That is not the case here. In all respects, the matters in dispute in the original bill of the plaintiffs and the action of the state against the Company, were precisely the same.

Upon these authorities, it must be considered as settled.

1. That in a controversy which is within the jurisdiction of two Courts and a suit therein is brought in one of them, it may pursue the same to a final determination of all questions without interference by the other;

2. And that the Court first having jurisdiction may enjoin all proceedings in that secondly brought in the other Court;

3. And that this rule will be enforced when the two Courts of concurrent jurisdiction are one federal and the other state.

J. M. WOOLWORTH,

Solicitor for Appellees.

W. D. MCHUGH,

Of Counsel.

Supreme Court of the United States.

No. 150.—October Term, 1902.

Frank N. Prout, Attorney General of the State of Nebraska, Appellant,
vs.
James C. Starr, Samuel W. Allerton, and The Chicago, Rock Island and Pacific Railway Company.

Appeal from the Circuit Court of the United States for the District of Nebraska.

[February 23, 1903.]

On August 3, 1893, James C. Starr and Samuel W. Allerton, citizens of the State of Illinois, on their own behalf and on behalf of others similarly situated, filed a bill of complaint in the Circuit Court of the United States for the District of Nebraska, against the Chicago, Rock Island and Pacific Railway Company, George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph F. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands, all of whom were officers of the State of Nebraska, and as such constituted its board of transportation, and William A. Dilworth, J. M. Rountz and J. W. Johnson, secretaries of said board, and all citizens of Nebraska.

The bill brought into question, under the Constitution and laws of the United States, the validity of a certain act of the legislature of Nebraska, approved April 12, 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." It was alleged that if the provisions of the act were put into effect, the earnings of the said railroad company from its business in the State would be materially lessened and would not pay the operating expenses thereof, nor yield any money from which the railroad property could be maintained, and would in effect work a confiscation thereof; that if the penalties imposed in the said act were enforced the entire property of the company would be taken away; that the plaintiffs were stockholders of the company, and had requested the officers and directors thereof to take proceedings to contest the validity of said act, but they had refused to do so. The principal prayers of the bill were that the company, its officers, agents and employes, should be restrained by injunction from adopting a schedule of rates to be charged for the transportation of freight on its road, according to the terms and

provisions of the said act; and that the said board of transportation, and its members and secretaries, should be enjoined from entertaining or determining any complaint, and from instituting or prosecuting any proceeding or action to enforce the observance of the previsions of said act; and that the attorney general should in like manner be enjoined from bringing any proceedings by way of injunction or by other process or civil action or indictment against said company for or on account of the non-observance by it of the provisions of said act.

Thereupon a restraining order of the Circuit Court was issued, enjoining the railroad company, the board of transportation and its members and the said attorney general, as prayed for in the bill; said order was to remain in force until a formal motion for injunction or to set aside the order be made, heard and decided; and a bond was to be given in the sum of $10,000. This order was duly served upon each and every of the said defendants, together with process of subpœna.

Afterwards, on the 2d day of September, 1893, a joint and several answer was filed by the said board of transportation, its members and secretaries. Therein it was averred that the said defendants were all agents and officers of the State of Nebraska, and had no personal or pecuniary interest whatever in the event of the suit, and were not proper parties thereto, but that said bill of complaint should have been brought against the State of Nebraska; that the said State was the real party in interest, and that the State had not and did not in any way whatever consent to the bringing of the action, and had not and did not submit in any way to the jurisdiction of the said Circuit Court to hear and determine the matters complained of in said bill; and the defendants submitted that, under the Eleventh Amendment of the Constitution of the United States, the courts of the United States were wholly without jurisdiction to try, hear and determine the several matters in difference charged and set forth in the bill of complaint; and that, under the Constitution of the United States and the constitution and laws of the State of Nebraska, the complainants had a full and adequate remedy at law. The defendants further denied that the State legislation in question violated the provisions of the Constitution of United States which forbid any State to deprive any person of his property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, or to pass a law impairing the obligation of a contract, or which interferes with commerce between the States.

On October 3, 1893, the complainants filed their replication to the answer.

At and about the same time, and in the same court, certain stockholders of the Chicago, Burlington and Quincy Railroad Company, of the Chicago and Northwestern Railway Company, and of the Union Pacific Railway Company, filed three other bills of complaint, in which the said railroad

companies and the said persons comprising the board of transportation were defendants, and in which bills the same facts and circumstances were alleged and the same relief was prayed for as in the bill in the present case. All of the State officers appeared and answered by the same counsel, and alleged the same defenses and contentions as were alleged in their answer in this suit. Those cases were put at issue, and after a large amount of evidence was put in, final decrees were rendered against the defendants, and, on March 7, 1898, the decrees of the Circuit Court were affirmed by this court. (*Smyth* v. *Ames*, 169 U. S. 466.) No testimony was taken by either party in the present case, but it was agreed, while the other cases were pending, that the proofs taken in them should be accepted with the same force and effect as if taken in this case; that the case should not be further particularly proceeded in until the Supreme Court should have rendered its decree in the other cases, when a decree should be entered conformable to those entered by the Supreme Court in the other three cases.

Meanwhile, Hastings, the attorney general when the bills were filed, was succeeded in his office by Smyth, who by proper order was substituted as defendant and appellant. Overlooking or disregarding the existing preliminary injunction of the Circuit Court, and the agreement that this case should abide the result in the other cases, Smyth, as attorney general, brought an action in the Supreme Court of the State of Nebraska against the said Chicago, Rock Island and Pacific Railway Company, alleging that the company, in violation of the act of April 12, 1893, at divers times had charged for the transportation of freight between points on its road in Nebraska rates in excess of those fixed by the act, and claiming judgment for $310,000, the amount of penalties alleged to have accrued. The attention of Attorney General Smyth was then called to the injunction order of the Circuit Court, and he thereupon gave the counsel of the company to understand that before the expiration of his term of office he would dismiss said action. Relying upon the understanding and agreement aforesaid, the company took no proceedings to enforce the said injunction and agreement.

On or about January 1, 1901, the said defendant Frank N. Prout succeeded the said Smyth in his office of attorney general, who declined to dismiss the said action in the Supreme Court of Nebraska. Whereupon the company filed its answer in the said action in due form, alleging the prior pendency of the action in the Circuit Court of the United States, and the existence in full force and effect, of the injunction order of that court. No reply to this answer appears to have ever been filed, and thereupon, on or about February 15, 1901, the company moved the said court for judgment upon the pleadings, but the court denied said motion, upon grounds set out in its opinion. (*State* v. *Chicago, Rock Island & Pacific Railway*

Company, 61 Neb. 595.) No further proceedings have been taken in said action, and the injunction order of the Circuit Court remains unmodified and in full force and affect.

On April 6, 1901, Starr and Allerton filed, in the Circuit Court of the United States, their supplemental bill, alleging the foregoing facts, and praying that the order and injunction previously issued upon their original bill be extended to and against the said Frank N. Prout, as attorney general, and that he be enjoined and restrained from further prosecuting the action brought in the name of the State of Nebraska against the railway company.

To this supplemental bill Frank N. Prout filed a demurrer on the ground that the bill was against the defendant in his official capacity as attorney general of the State, and was against the State, and that therefore the court was, under the Eleventh Amendment of the Constitution, without jurisdiction.

Upon argument the demurrer was overruled, and the injunction prayed for was issued. The order directing the injunction provided that if the defendant elected to stand by his demurrer and declined further to plead, a final decree should go as in the case of *Smyth* v. *Ames*, and the defendant having elected in open court to stand upon his demurrer, a final decree was entered conformable to that in *Smyth* v. *Ames*. From that decree the defendant Frank N. Prout appealed to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

As the appellant demurred to the supplemental bill, and elected to stand on his demurrer when the final decree of the Circuit Court was entered, we have now only to consider the questions of law presented by the demurrer.

That it was competent for the parties, plaintiffs and defendants, to agree to dispense with taking evidence, to accept the evidence taken in the other cases, and to abide by the decrees therein to be entered, we have no reason to doubt, (*Pacific R. R.* v. *Ketchum*, 101 U. S. 289,) and that such an agreement was entered into is conceded. The allegations of fact and the contentions of law being the same in all the cases, such an arrangement was convenient and proper. The decrees in the other cases having been affirmed by this court, it was in accordance with that agreement that the Circuit Court should enter a similiar decree in the present case. In so far, then, as the substantial merits of the case are concerned, we are not called upon to consider them. They have been concluded by the reasoning and opinion of this court in the other cases. (*Smyth* v. *Ames*, 169 U. S. 466.)

But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the com-

plaint is essentially against the State of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States.

It is a sufficient answer to this contention that it was made, considered and determined in *Smyth* v. *Ames*. In the opinion in that case it was said:

"Within the meaning of the Eleventh Amendment of the Constitution, these suits are not against the State, but against certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment. (*Pennoyer* v. *McConnaughy*, 140 U. S. 10; *In re Tyler*, 149 U. S. 164; *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362; *Scott* v. *Donald*, 165 U. S. 58; *Tindal* v. *Wesley*, 167 U. S. 204.)"

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment. (*Hans* v. *Louisiana*, 134 U. S. 10; *North Carolina* v. *Temple*, 134 U. S. 22; *Harkrader* v. *Wadley*, 172 U. S. 148; *McGhee* v. *Fitts*, 172 U. S. 516.)

It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.

It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as attorney general of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney general of a State cannot be restrained by an injunction of a United States court from enforcing the criminal laws of the State.

This, we think, is only another phase of the same question.

It is true that the defendant was included in the bill as the attorney general of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against the valid criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood.

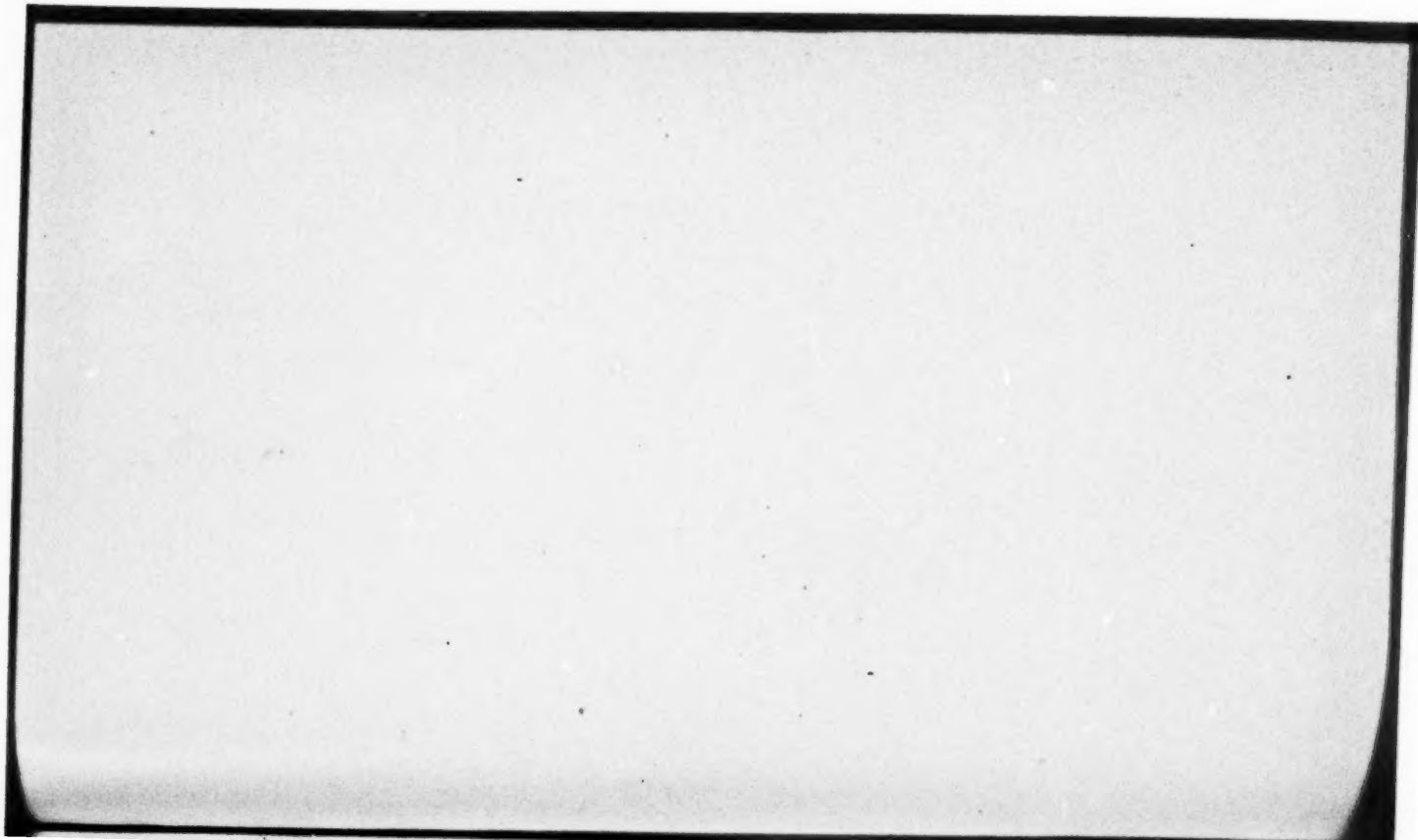
Several changes of incumbents in the office of attorney general took place while the cases were proceeded in, but that did not deprive the court of jurisdiction. The successors in office were duly substituted, and thus became subjected to the preliminary and final decrees of the court. The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the Federal court to the State court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court. (*Peck* v. *Jenness*, 7 How. 625; *Chittenden* v. *Brewster*, 2 Wall. 191; *Orton* v. *Smith*, 18 How. 263.)

The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the State court. (*Harkrader* v. *Wadley*, 172 U. S. 148, 166.)

The decree of the Circuit Court is *Affirmed*.

Mr. Justice HARLAN concurring. I am in favor of modifying the judgment in some particulars and then affirming it, but I do not concur in all the reasoning of the opinion.

True copy.

Test:

Clerk Supreme Court, U. S.